SUPREME COURT, U.S.
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No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed June 2, 2010
Certiorari Granted October 12, 2010

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3949

Charles Guarnieri, Jr., Plaintiff-Appellee,

v.

Duryea Borough, *et al.*, Defendants-Appellants.

Appeal from Middle District of Pennsylvania

Date	Docket Entry
09/29/2008	CIVIL CASE DOCKETED. * * *
01/26/2009	ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellants. * * *
01/26/2009	ELECTRONIC JOINT APPENDIX on behalf of Appellants. * * *
01/28/2009	HARD COPY RECEIVED from Appellants [of] Brief with Volume I of Appendix attached. * * *
01/28/2009	HARD COPY RECEIVED from Appellants [of] Brief with Volume I of Appendix attached. * * *
02/25/2009	ELECTRONIC BRIEF on behalf of Appellee/Cross-Appellant Charles J. Guarnieri, Jr. * * *
02/26/2009	HARD COPY RECEIVED from Ap-

	pellee/Cross-Appellant Charles J. Guarnieri, Jr. [of] Brief. * * *
03/27/2009	ECF FILER: ELECTRONIC BRIEF on behalf of Appellants. * * *
03/30/2009	HARD COPY RECEIVED from Appellants [of] Reply Brief. * * *
	* * *
04/27/2009	ECF FILER: ELECTRONIC BRIEF on behalf of Appellee Charles J. Guarnieri, Jr. * * *
04/28/2009	HARD COPY RECEIVED from Appellee Charles J. Guarnieri, Jr. [of] Reply Brief. * * *
	* * *
10/27/2009	ARGUED on Tuesday, October 27, 2009 before SLOVITER, FUENTES and HARDIMAN, Circuit Judges. * * *
02/04/2010	NOT PRECEDENTIAL OPINION Coram: SLOVITER, FUENTES and HARDIMAN, Circuit Judges. Total Pages: 13. Judge: SLOVITER Authoring Judge. * * *
02/04/2010	JUDGMENT, Affirmed in Part and Reversed in Part. Costs taxed against Appellants. * * *
02/05/2010	ECF FILER: BILL OF COSTS filed on behalf of Appellee Charles J. Guarnieri, Jr. * * *
02/18/2010	ECF FILER: Petition filed by Appellants. * * * for Rehearing before the original panel and

	the court en banc. * * *
03/04/2010	ORDER (SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges) denying [petition] for Panel Rehearing and for Rehearing En Banc filed by Appellants/Cross-Appel-lees. * * * Dolores K. Sloviter, Authoring Judge. * * *
03/12/2010	MANDATE ISSUED. * * *
06/07/2010	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Duryea Bor on 06/02/2010. Supreme Court Case No. 09-1476. * * *
10/12/2010	NOTICE of U.S. Supreme Court. Disposition at [sic] No. 09-1476. Petition for Writ of Ceriorari filed by Borough of Duryea granted on 10/12/2010. * * *

UNITED STATES DISTRICT COUR
MIDDLE DISTRICT OF PENNSYLVANIA
(SCRANTON)

No. 3:05-cv-01422-ARC

Charles J. Guarnieri, Jr., Plaintiff,

v.

Duryea Borough, *et. al.*, Defendants.

Date Filed	#	Docket Text
		* * *
07/18/2005	1	COMPLAINT * * * filed by Charles J. Guarnieri, Jr. * * *
		* * *
08/29/2005	8	ANSWER to Complaint with Jury Demand by All Defendants. * * *
		* * *
12/21/2006	38	AMENDED COMPLAINT against all defendants filed by Charles J. Guarnieri, Jr. * * *
12/22/2006	39	MOTION for Summary Judgment by All Defendants. * * *
12/22/2006	40	STATEMENT OF FACTS *in support of Their Motion for*

		Summary Judgment filed by All Defendants. * * *
12/22/2006	41	BRIEF IN SUPPORT re 39 MOTION for Summary Judgment filed by All Defendants. * * *
	* * *	
12/29/2006	43	*Answer of Defendants to Amended Complaint* ANSWER to Complaint by All Defendants. * * *
	* * *	
01/15/2007	45	BRIEF IN OPPOSITION re 39 MOTION for Summary Judgment filed by Charles J. Guarnieri, Jr. * * *
01/15/2007	46	STATEMENT OF FACTS re 40 Statement of Facts, *In Dispute* filed by Charles J. Guarnieri, Jr. * * *
	* * *	
11/15/2007	51	MEMORANDUM AND ORDER granting in part and denying in part 39 Defendants' Motion for Summary Judgment as follows: Defendants' motion will be granted with respect to the Fourth Amendment claims, the Fourteenth Amendment claims for pre-deprivation and post-deprivation pro- cess in

		Count I, and the First Amendment claim for violation of the right to free speech in Count II. Defendants' motion will be denied with respect to the First Amendment claim for violation of the right to freedom of petition in Count II and the First Amendment claim for violation of the right to free association in Count III. Plaintiff's claim for violation of the right to freedom of petition pursuant to the First Amendment in Count IV will remain, as Defendant failed to move for its dismissal in their motion. Signed by Judge A. Richard Caputo on 11/15/07. * * *
* * *		
03/26/2008	61	PRETRIAL MEMORANDUM by Charles J. Guarnieri, Jr. * * *
* * *		
03/27/2008	63	PRETRIAL MEMORANDUM by All Defendants. * * *
* * *		
04/18/2008	102	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri,

		Jr., and against Defendant, Duryea Borough, in the amount of $5.350.00. * * *
04/18/2008	103	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Ann Dommes, in the amount of $11.501.00. * * *
04/18/2008	104	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Lois Morreale, in the amount of $11.501.00. * * *
04/18/2008	105	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Frank Groblewski, in the amount of $11.501.00. * * *
04/18/2008	106	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Edward Orkwis, in the amount of $11.501.00. * * *
04/18/2008	107	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Robert Webb, in the amount of $11.501.00. * * *

04/18/2008	108	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Audrey Yager, in the amount of $11.501.00. * * *
04/18/2008	109	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Joan Orloski, in the amount of $11.501.00. * * *
04/18/2008	110	JUDGMENT be and hereby is entered in favor of Plaintiff, Charles J. Guarnieri, Jr., and against Defendant, Alfred Akulonis, in the amount of $11.501.00. * * *
* * *		
04/25/2008	121	MOTION for Judgment as a Matter of Law *Post Trial Motions*, MOTION for New Trial by All Defendants. . * * *
04/28/2008	122	MOTION for Attorney Fees by Charles J. Guarnieri, Jr. * * *
04/28/2008	123	BRIEF IN SUPPORT re 122 MOTION for Attorney Fees filed by Charles J. Guarnieri, Jr. * * *
* * *		
06/16/2008	139	BRIEF IN OPPOSITION re 121

		MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by all Defendants. * * *
* * *		
07/17/2008	145	BRIEF IN OPPOSITION re 121 MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by Charles J. Guarnieri, Jr. * * *
07/31/2008	146	REPLY BRIEF re 121 MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by All Defendants. * * *
08/04/2008	147	Supplement by All Defendants to 122 MOTION for Attorney Fees, 133 brief in Opposition. * * *
09/02/2008	148	MEMORANDUM AND ORDER, Motions terminated: 121 MOTION for Judgment as a Matter of Law *Post Trial Motions* MOTION for New Trial filed by All Defendants, 127 Motion to Stay Proceedings to Enforce Judgment filed by All Defendants. IT IS HEREBY ORDERED that: (1) Defen-

		dants' renewed motion for judgment as a matter of law pursuant to Rule 50 and motion for a new trial (Doc. 121) pursuant to Rule 59 are DENIED. (2) Defendants' motion to stay the enforcement of the judgment pursuant to Federal Rule of Civil Procedure 62(b) (Doc. 127) is DENIED as moot. Signed by Honorable A. Richard Caputo on 9/2/08. * * *
	* * *	
09/18/2008	150	NOTICE OF APPEAL in NON-PRISONER Case as to 104 Clerk's Judgment, 103 Clerk's Judgment, 102 Clerk's Judgment, 105 Clerk's Judgment, 108 Clerk's Judgment, 109 Clerk's Judgment, 106 Clerk's Judgment, 110 Clerk's Judgment, 107 Clerk's Judgment, 148 Memorandum & Order, Terminate Motion, by All Defendants. Filing Fee and Docket Fee PAID. * * * The Clerk's Office hereby certifies the record and the docket sheet avail-

		able through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. * * *
* * *		
09/29/2008	152	USCA Case Number 08-3949 for 150 Notice of Appeal, filed by All Defendants. * * *
10/09/2008	153	MEMORANDUM AND ORDER: IT IS HEREBY ORDERED that Plaintiff's motion for attorneys' fees and costs (Doc. 122) is GRANTED IN PART and DENIED IN PART as follows: (1) Attorney's fees for Ms. Cynthia Pollick are awarded in the amount of forty-five thousand dollars ($45,000.00); (2) Costs are awarded in the amount of four thousand five hundred forty-one dollars and ninety-nine cents ($4,541.99). * * *
10/30/2008	154	NOTICE OF APPEAL in NON-PRISONER Case as to 153 Memorandum & Order, Terminate Motions, by Charles J. Guarnieri, Jr. Filing Fee and Docket Fee Paid. * * * The Clerk's Of-

		fice hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. * * *
11/12/2008	155	USCA Case Number 08-4428 for 154 Notice of Appeal, filed by Charles J. Guarnieri, Jr. * * *
* * *		
03/12/2010	171	MANDATE of USCA as to 150 Notice of Appeal, filed by All Defendants, 154 Notice of Appeal, filed by Charles J. Guarnieri, Jr. * * *

Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

In the Matter of Arbitration between	
BOROUGH OF DURYEA	AAA Case No. 14 390 00720 03
- and-	Grievance of Charles J Guarnieri, Jr.
THE DURYEA BOROUGH POLICE DEPARTMENT	

The arbitration hearings in this matter were held in Duryea, Pennsylvania on August 16 and September 9, 2004. Representing Borough of Duryea (hereinafter "the Borough") was Joseph C. Rudolf, Esq. Representing The Duryea Borough Police Department (hereinafter "the Police") was Sean T. Welby, Esq. The following witnesses were sworn and testified at the hearing:

Lois Morreale, Borough Secretary.
Edward Orkwis, Borough Council Member.
Robert Webb, Borough Council Member.
Keith A. Moss, Mayor.
Ann R. Dommes, Borough Council Chair.
Charles J. Guarnieri, Jr., Grievant.

The parties submitted post-hearing briefs, which the American Arbitration Association forwarded to the arbitrator on November 29, 2004.

Issue

Did the Borough have just cause to terminate the employment for Charles J. Guarnieri, Jr., on February 7, 2003? If not, what shall be the remedy?

Background

The parties entered into a collective bargaining agreement ("the Agreement") effective October 1, 2001 (Joint Exhibit 1). Article 17 of the Agreement provides: "No full-time police officer covered by this agreement shall be discharged, suspended or demoted except for 'Just Cause'." Any questions regarding such discipline is subject to the grievance/arbitration procedure set forth in Article 16.

By action of Borough Council, Mr. Guarnieri was hired as Chief of the Duryea Borough Police Department in September 2000. Mr. Guarnieri was a life-long resident of the Borough and had previously worked for 18 years in the police department of a nearby municipality. The Police Department consisted of three full-time officers and approximately 12 part-time officers. While Borough Council is responsible for the Police Department budget and fiscal matters, the Mayor has day-to-day responsibilities for Police Department operations and is the direct supervisor of the Chief of Police.

On February 5, 2003 a hearing was held by Borough Council regarding the employment of Mr. Guarnieri (Union Exhibit 1 is the transcript of the hearing). On February 7, 2003 Borough Council un-

animously approved a motion terminating the employment of Mr. Guarnieri. Barry J. Chromey, Esq., Borough Solicitor, wrote Mr. Guarnieri a letter dated February 14, 2003 with Borough Council's reasons for the termination action (Joint Exhibit 2). Mr. Guarnieri filed a grievance on February 20, 2003 to protest his termination and to request reinstatement with full back pay (Joint Exhibit 3). Mayor Moss replied on the following day with the Step 1 decision: "I wish to advise you that I agree with you in this matter. At this time I am advising you to proceed to the next step of the grievance procedure." (Joint Exhibit 4) Mr. Guarnieri filed an appeal to Step 2 to Ms. Dommes on February 22, 2003 (Joint Exhibit 5). On march 3, 2003, be notified Ms. Dommes of his intent to proceed to arbitration (Joint Exhibit 6). Mr. Welby wrote to the American Arbitration Association on April 18, 2003 requesting a list of arbitrators. On July 3, 2003 the Association notified J. Joseph Loewenberg that he had selected as arbitrator in this matter.

Summary of the Position of the Borough

The Borough had ample grounds to terminate the employment of Mr. Guarnieri. The Borough's solicitor, Barry J. Chromey, clarified the respective authority of the Mayor and Borough Council with regard to police operations in his letter of November 21, 2002 (Borough Exhibit 14): "...borough council has sole authority and responsibility for budgeting and scheduling the number of officers for each shift and supervising them on duty." Yet Mr. Guarnieri consistently failed to follow the directives of Borough

Council and engaged in behavior inappropriate for a police officer.

From the outset of his tenure, Mr. Guarnieri ignored the budget by scheduling extra police officers and overtime, especially for himself (Borough Exhibit 2). Borough Council in formal sessions and Council members informally cautioned Mr. Guarnieri about the unacceptable level of spending. When confronted by Council in February 2002, Mr. Guarnieri explained the prior year's scheduling pattern resulted from his getting a handle on the department, and he pledged he would remain within budgetary limits in the future. It was soon apparent the pledge was not being honored. According to the testimony of Ms. Morreale, Police Department salaries were already $8,000 to $9,000 over budget by June 2002 (Borough Exhibit 1).

On September 5, 2002, Ms. Morreale wrote to Mr. Guarnieri on behalf of Borough Council regarding three matters on which Mr. Guarnieri had been given verbal instructions but with which he has not compiled (Borough Exhibit 3). The first was Mr. Guarnieri's failure to follow the borough's purchase-order system. Not only did Mr. Guarnieri order items not directly related to police activity (Borough Exhibit 6), but also he had not obtained the necessary pre-approval of purchase orders. Even after Ms. Morreale's letter, Mr. Guarnieri continued to make purchases without prior approval (Borough Exhibit 7). The second item in Ms. Morreale's letter of September 5, 2002 was to remind Mr. Guarnieri that, despite two verbal requests at Borough Council meet-

ings. He had not yet inspected the capabilities of Glodzik's Garage as a possible towing operator in the borough. Borough council wanted the inspection completed and a written report prior to its meeting on September 18. Mr. Guarnieri never undertook the inspection or reported to Borough Council on this matter prior to his termination. The third item on the letter requested a written update on AED training for officers prior to Borough Council meeting on September 18. Mr. Guarnieri never submitted the report.

Mr. Guarnieri's only response to these directives was a letter dated September 18, 2002 to Ms. Dommes acknowledging receipt of correspondence from Ms. Morreale but ignoring its contents and insisting "...that all correspondence and questions regarding my department from yourself or any member of council be in writing consisting of a valid signature(s)..." (Borough Exhibit 5). Solicitor Chromey wrote to Mr. Guarnieri on October 1, 2002 that failure to follow the directives of the Borough Secretary would "result in disciplinary actions for insubordination" (Borough Exhibit 11).

Because Mr. Guarnieri continued to disregard the instructions of Borough Council, Council began to implement formal discipline. A letter from Ms. Morreale on November 19, 2002 noted the weekly schedule included an extra police officer, for which Mr. Guarnieri was being issued a written reprimand (Borough Exhibit 12). A second written reprimand was issued the following day for the appearance of four officers on November 18 not listed on the schedule

(Borough Exhibit 13). Solicitor Chromey wrote to Mr. Guarnieri on November 26, 2002 requesting a written statement of the duties and responsibilities of the Chief of Police (Borough Exhibit 17). He repeated the request in a letter of December 6 with a deadline of December 11 (Borough Exhibit 15). Mr. Guarnieri never compiled with this directive. On December 19, 2002, Ms. Moreale informed him that this failure had led to a third notice of reprimand (Borough Exhibit 16). The letters of reprimand continued warnings of further discipline up to and including termination.

Efforts to arrange face-to-face meeting between members of Borough Council and Mr. Guarnieri were futile. When asked to attend a private work meeting of Council in September 2002, Mr. Guarnieri let the Mayor, but not Council members, know he would not be present, yet he showed up at the public meeting 90 minutes later. In response to written instructions to attend a meeting on October 8, 2002 (Borough Exhibit 8), Mr. Guarnieri stated simply that he was unavailable (Boruogh Exhibit 9). Solicitor Chromey scheduled a mandatory meeting regarding Mr. Guarnieri's job performance with Mr. Guarnieri and Ms. Dommes for January 10, 2003 (Borough Exhibit 18). Mr. Guarnieri came to the meeting but refused to participate.

Mr. Guarnieri's personal conduct toward individual Council members reflected his hostility and was inappropriate for a Chief of Police. Mr. Orkwis testified that following a Council meeting in June 2002 Mr. Guarnieri had pinned him against a closed

door and stuck paper under his chin (Union Exhibit 1). In November 2002 Mr. Guarnieri offered no explanation or defense at the meeting. Mr. Guarnieri's conduct in his 30 months as Chief of Police had ill-served the Police Department, the Borough, Council members and cistizens of the borough. Borough Council was left with no choice but to terminate the employment of Mr. Guarnieri as Chief of Police (Joint Exhibit 2). By any standard, the termination was for just cause. The grievance should therefore be denied.

Summary of the Position of the Police

The Borough did not have just cause to terminate Mr. Guarnieri. Indeed, the charges for its disciplinary action lacked foundation, had been the basis of prior discipline, or had never been deemed serious enough to warrant discipline. The charges were of insufficient merit to warrant the discipline. Moreover, the Borough violated basic due-process rights of Mr. Guarnieri.

The Borough's major complaint concerning Mr. Guarnieri's operation of the Police Department was that he scheduled extra officers, which as largely responsible for the department's budgetary overruns in 2001 and 2001. This complaint led to the issuance of two written reprimands in November 2002. Borough Council was aware that Mr. Guarnieri continued to schedule extra officers at the direction of the Mayor, who was his immediate supervisor. Mr. Guarnieri was clearly caught between two political forces. Once Solicitor Chromey clarified the respective authorities of the Mayor and Borough Council with regard to po-

lice operations, Mr. Guarnieri compiled with the scheduling instructions of Borough Council. In other words, the Borough had no further reason to discipline Mr. Guarnieri on this account.
Mr. Guarnieri was charged with not providing a written list of job duties and responsibilities. Defining job responsibilities is a management function that should never have been assigned to Mr. Guarnieri. Initially Solicitor Chromey made a suggestion and later a request to Mr. Guarnieri that he provide such a list. Although Solicitor Chromey had no supervisory responsibility for the Chief of Police, he issued a written directive to Mr. Guarnieri on December 6, 2002. When Mr. Guarnieri did not comply, the Borough issued a reprimand (Borough Exhibit 16). No further directives regarding this matter were issued.

In the Solicitor's letter of February 17, 2003, the list of charges to justify the termination included a number of alleged improprieties for which Mr. Guarnieri was never disciplined and which the Borough excused in other venues. One such instance was Mr. Guarnieri's failure to follow the purchase-order policy. As noted in his letter of November 19, 2002 to Ms. Dommes. Mr. Guarnieri had never received a copy of the policy (Borough Exhibit 4). Ms. Dommes testified at the meeting on February 5, 2003 that Mr. Guarnieri complied with the policy once he had been given a copy.

A second allegation was the failure to attend counseling meetings. Mr. Guarnieri explained that in one case he received notice from the Borough only the day before the scheduled meeting and that in

another he had a personal conflict. He did not even receive a verbal warning for these alleged discrepancies. Mr. Guarnieri met the requirement of attending the meeting on January 10, 2003.

A third allegation was that Mr. Guarnieri failed to follow the directive of the Borough Secretary. Supervisory authority over the Chief of Police was shared by the Mayor and Borough Council. The Borough Secretary did not have authority to issue directives to Mr. Guarnieri. When she did, Mr. Guarnieri requested that Council deal with him directly (Borough Exhibit 5). Mr. Guarnieri never received a response, not even to the effect that Council had designated that Borough Secretary to represent its interests in the operation of the Police Department. Nor did Council discipline Mr. Guarnieri for this alleged violation.

The Borough lacks proof of the allegations of individual Council members that Mr. Guarnieri engaged in inappropriate behavior. Mr. Orkwis' allegation of being physically confronted by Mr. Guarnieri in June 2002 remains unsubstantiated. The lack of corroboration is all the more remarkable since it supposedly occurred at the end of a public Council meeting. Moreover, Mr. Guarnieri and Mayor Moss presented a version of the incident different from that of Mr. Orkwis. In any event, Mr. Orkwis did not think the matter serious enough to inform fellow council member of the incident promptly or ever to ask them to initiate disciplinary action. Likewise, Mayor Moss and Mr. Guarnieri denied that Mr. Guarnieri had threatened Mr. Webb in the Mayor's office in Novem-

ber 2002. Mr. Webb filed a civil suit, but the complaint was dismissed by the local magistrate, and Borough Council never disciplined Mr. Guarnieri upon learning of the allegation.

The Borough committed numerous due-process errors in disciplining Mr. Guarnieri. These errors were sufficiently egregious to determine that Council's termination throughout the disciplinary process. As noted by the Pennsylvania Labor Relations Board, the Borough did not permit Mr. Guarnieri to have legal counsel of Union representation at the investigatory meeting on January 10, 2003. When Mr. Guarnieri learned at the meeting that it could lead to discipline, his request for representation was rebuffed. The Borough continued to deny Mr. Guarnieri representation when it learned that his legal counsel would be unavailable for the disciplinary meeting scheduled for February 7, 2003. Nothing prevented the Borough from postponing the meeting to allow attendance by Mr. Guarnieri's counsel and to ensure protection of Mr. Guarnieri's rights.

A different kind of procedural error was the Borough's failure to cite sections of law or the Borough Civil Service Code when issuing discipline. Article 17 of the Agreement requires the Borough to state reasons for discipline "...in accordance with either the Police Tenure Act, 53 P.S. 811-816 or civil service..." The Borough's letter setting for the reasons for the termination did not include any reference to the state or civil service code in the charges on which the termination action was based.

The adjudicatory process of the disciplinary hearing was a sham that violated Mr. Guarnieri's due-process rights. The members of Borough Council were the arbiters in determining whether Mr. Guarnieri was guilty of charges. Their role was to judge impartially whether the evidence presented supported each charge. The hearing procedure revealed an inherent bias. Six of the seven Council members testified at the hearing. Some were directly involved in particular charges. It is fundamental that persons cannot adjudicate matters in which they are prosecutors. In other words, Mr. Guarnieri never received a fair hearing on the charges.

Even after the termination of Mr. Guarnieri, the Borough continued to violate his contractual rights. Article 26 of the Agreement provides that "...the municipality shall not make any public comment on the reason for any disciplinary action brought against the officer." In the Sunday Dispatch of March 16, 2003 Borough Council published a letter defending the termination of Mr. Guarnieri (Union Exhibit 3). Since Mr. Guarnieri never agreed to publication of the letter, the Borough clearly violated the Agreement.

The Borough has not established just cause to terminate Mr. Guarnieri. Throughout Mr. Guarnieri's ordeal, it failed to substantiate the charges brought against him; it neglected to observe the terms of the Agreement and relevant statutes; and it disregarded employees' due-process rights. The grievance should be sustained, and Mr. Guarnieri should be reinstated with back pay and benefits.

Discussion

The matter of Mr. Guarnieri's termination involves numerous substantive and procedural issues. The arbitration hearing included two full days of hearing and the introduction of 30 exhibits, one of which was the transcripts of another proceeding. The post-hearing briefs added twelve exhibits of arbitration awards, court decisions, PLRB determinations, etc. No wonder the case is complex, and the outcome not straightforward.

All witnesses at the arbitration hearing agreed that Mr. Guarnieri's difficulties with Council multiplied in late summer 2002. Certainly before then Borough Council had been aware of Police Department budget problems as well as some personal encounters involving Mr. Guarnieri, but Council members individually and as a group felt they might be able to work with Mr. Guarnieri on the major issues. Council's attempt to reorganize the Sewer Authority may have been a critical turning point. Ms. Dommes and Mr. Guarnieri concurred that she had asked him to intervene with the Mayor in an effort to prevent a veto of Council's bill. Mr. Guarnieri refused the request, and the Mayor vetoed the bill. Although Mr. Guarnieri had wanted to keep himself and the Police Department out of politics, it did prove to be possible. Mr. Guarnieri and the Mayor were now seen as allies, and Mr. Guarnieri made no effort to dispel that view. As relations between the Mayor and Council deteriorated, so, too, did relations between Mr. Guarnieri and Council. Council's tolerance for Mr. Guarnieri's independent ways dissipated and its

efforts to regain control over Police Department spending increased. What Mr. Guarnieri did not fully appreciate was that the Mayor has limited responsibilities regarding the Police Department and that ultimate authority for the Chief of Police lies with Council. Even Council members who were viewed as supported of the Mayor found themselves unable to defend Mr. Guarnieri. The upshot was a unanimous vote on February 7, 2003 in whether the Council's action constituted discharge for just cause. The question includes substantive and procedural aspects.

Borough Council terminated the employment of Mr. Guarnieri because of twelve reasons set forth in Mr. Chromey's letter of February 14, 2003 (Joint Exhibit 2). The Borough withdrew the first and tenth in the list of reasons at the outset of the arbitration hearing. Although the Borough introduced evidence of other alleged misconduct, such as the Fire Police identification issued to Mr. Radle, such evidence was not part of the charges brought against Mr. Guarnieri at the time of his termination and hence was not a cause for the decisions to discharge him. The Borough must justify its disciplinary action for reasons stated at the time of its decision; it cannot add justifications after the fact.

Credibility was an issue in several of the remaining ten reasons for terminating the employment of Mr. Guarnieri. In particular, the Police questioned the accuracy of the accounts provided by Messrs. Webb and Orkwis in their respective encounters with Mr. Guarnieri. Both Mr. Guarnieri and Mr. Moss vi-

gorously denied the versions of the Council members. Mr. Webb's testimony at the Council meeting of February 5, 2003 was more limited and less alarming than that presented at the arbitration hearing and in his contemporaneous notes (Borough Exhibit 12). All in all, however, I found the testimony of the two Council members more credible than that of the Police witnesses.

A major problem remains nonetheless with the charges relating to the two Council members. Regardless of the validity of their accounts, Council never considered them prior to the meeting of February 5, 2003. Although the incident with Mr. Orkwis occurred in June 2002, Mr. Orkwis testified he did not bring it to Council's attention immediately because he though it more important to deal with the budget problems involving the Police Department. Mr. Webb advised other Council members of his encounter with Mr. Garnieri in November 2002 on the following day, but Council left it to the courts to deal with the matter. In both situations, therefore, Council as the employer took no action. It did not investigate the situations, let alone award any admonition or discipline to Mr. Guarnieri. The administration of a fair disciplinary procedure requires prompt investigation of each occurrence and imposition of reasonable discipline to correct improper behavior soon thereafter. If Council took no action at the time each situation took place, it was inappropriate to raises these matters for the first time in February 2003 as a basis for discipline. This conclusion does not exculpate Mr. Guarnieri's behavior, but it does bar using

these matters as reasons for justifying the termination action.

Council's primary complaint with Mr. Guarnieri's administration of the Police Department was his failure to adhere to the budget. Council believed the scheduling of extra police officers was a major contributor to the discrepancy between budget and actual expenditures. Overtime also added to the problem. Mr. Guarnieri was made aware of Council's concern in November 2001 and then again in February 2002. Council members reiterated their anxiety informally on many occasions thereafter. The list of charges in the letter of termination refers to verbal warning for scheduling of police officers and budget problems as well as "to failure to manage police budget in accordance with the provisions of the collective bargaining agreement." While Council expressed its distress individually and as a body in 2002, no evidence was presented that Mr. Guarnieri ever received formal verbal warnings about scheduling and/or budget in an disciplinary context. Yet there is no doubt that council's concern and interest in restraining spending budget limits were fully and repeatedly conveyed to Mr. Guarnieri.

The topic of police scheduling was the basis of the first two formal written reprimands issued by the Borough. On November 19, 2002 Mr. Guarnieri received a reprimand for scheduling an extra police officer on two occasions during the week of November 17 (Borough Exhibit 12). The following day Mr. Guarnieri received a reprimand for extra police officers on the street on November 18, 2002 (Borough Ex-

hibit 12). Mr. Guarnieri felt the reprimands were unwarranted. In the first instance, he claimed he was caught between directives of Council and the Mayor. At the hearing on February 5, 2003, Ms. Dommes referred to a letter from Mr. Guarnieri dated November 18, 2002 stating that Mayor Moss had ordered him to maintain police schedules and asking for clarification (Union Exhibit 1, p. 25). That clarification was forthcoming in Mr. Chromey's letter of November 21, 2002 (Borough Exhibit 14). As for the extra police officers on November 18, 2002, Mr. Guarnieri explained those officers were paid under a separate grant budget, though he admitted he had not listed them on the weekly schedule. Mr. Guarnieri was aware of Council's expectations with respect to police scheduling. Nothing in the testimony or evidence gives reason to overturn the grounds for these disciplinary actions. It should be noted, however, that the two written reprimands for scheduling errors were issued on consecutive days for actions that occurred prior to the first violation. Mr. Guarnieri did not have sufficient time between the two reprimands to demonstrate corrective behavior for his improper action. After the second reprimand, the Borough did not issue subsequent discipline for scheduling activities it considered improper.

The Borough sent Mr. Guarnieri a third written reprimand on December 19, 2002 for his continued failure to provide a written report on his job duties and responsibilities (Borough Exhibit 16). Mr. Guarnieri testified that the mayor had instructed him to ignore the request, and the Police argued that Solicitor Chromey had no authority to issue a direc-

tive to the Police Chief, especially one that was the responsibility of management to fulfill. Mayor Moss offered no testimony on this matter. It seems clear that Solicitor Chromey intervened, not on his own initiative, but rather on behalf of Council after Mr. Guarnieri ignored prior verbal and written requests. Although final responsibility for creating job descriptions rests with management, in this case Borough Council, it is not uncommon for management to seek the input of employees to ensure a comprehensive list of duties and responsibilities and to help gain agreement on the result. In other words, the request made of Mr. Guarnieri was not inappropriate; his unwillingness to the point of outright refusal was. When the list of charges includes a reference to failure to comply with reprimands, the only reprimand it can apply to is the failure to provide a written report on job duties.

Included in the reasons for termination was failure to attend counseling meeting with the employer. Ms. Dommes testified that such meeting had been scheduled in September, October, and December 2002 to no avail. The Borough contended Mr. Guarnieri attended the meeting on January 10, 2003 only because it was held during his regular work hours and because of his threat of disciplinary action if he did not attend (Borough Exhibit 18). Mr. Guarnieri explained that he received notice of the September meeting only one day before and that he had a personal conflict with the October meeting. Even were the excuses legitimate, one may conclude that Mr. Guarnieri was not eager to attend counseling meetings and made no attempt to schedule them at a

mutually satisfactory time. At the same time, the Borough never disciplined Mr. Guarnieri for failure to attend counseling meetings or, prior to the January 2003 meeting, indicated that failure to attend could result in discipline. The failure to attend counseling meetings is therefore more an indication of Mr. Guarnieri's attitude and lack of cooperation than a separate reason for discharge.

The final two charges are general in nature, related to each other, and applicable to many of the previously discussed charges: failure to cooperate with the Borough Secretary and engaging in a pattern of insubordination. Ms. Morreale testified at length at the Council meeting of February 5, 2003 and at the arbitration hearing about the difficulties she encountered in dealing with Mr. Guarnieri, particularly in the final five months of his tenure. These difficulties included Mr. Guarnieri's failure to comply with Council directives that she communicated to Mr. Guarnieri (Borough Exhibit 3), failure to follow policies such as the purchase-order system, and failure to abide by the scheduling requirements of the Agreement (Borough Exhibits 12, 13). Mr. Guarnieri's response was that the directives had not been communicated directly by Council (Borough Exhibit 5), that he had not been furnished copies of policies (Borough Exhibit 4), and that he was an innocent victim caught between the demands of Council and the mayor. None of Mr. Guarnieri's responses is convincing. The established practice of the Borough had been for the Borough Secretary to communicate Council decisions to department heads and Borough employees. Ms. Morreale made it clear in her letter

of September 5, 2002 that she was writing "[a]s per the request of the members of the Duryea Borough Council..." (Borough Exhibit 3). It also seems unlikely that Mr. Guarnieri was ignorant of the new purchase-order policy passed by Council in 2002, even if he had not received a personal copy of the policy. No evidence was forthcoming regarding any explicit orders from the Mayor that were contrary to those of Council. If Mr. Guarnieri believed that he had received contradictory instructions, he made no effort to convey his predicament to Council or attempt to seek a resolution of the differences. With respect to the two charges, Mr. Guarnieri's characteristic conduct from September 2002 onward was evasion of following directives and policies of Council until the issue came to a head. Once Mr. Guarnieri could no longer deny knowledge of a directive or policy, such as purchase ordering or police scheduling, he would be inclined to follow it. According to Mr. Morreale, some expectations to this inclination continued, such as Mr. Guarnieri's not submitting police schedules to her in late December and never presenting a written list of job duties. While Mr. Guarnieri can properly be charged with lack of cooperation with Ms. Morreale, his outright insubordination was the exception rather than the rule.

To summarize the findings on the substantive charges against Mr. Guarnieri, Mr. Guarnieri was guilty of many of them, but that in and of itself may not serve as justification for Council's disciplinary action. Some charges, such as those involving encounters with individual Council members, must be excluded because they were never brought to Mr.

Guarnieri's attention as serious offenses prior to February 2003. Other charges, including informal verbal warning for misadministration of the Police Department in 2002, may be substantively correct but cannot be included in reasons to support the discharge because such warnings were not viewed as steps in the disciplinary system. [On the other hand, Mr. Guarnieri willfully and deliberately engaged in behavior over a period of time that thwarted the wishes of Council and that frustrated the Borough Secretary. His outright refusal to follow orders was limited, especially once he had received written reprimands for specific misconduct. The most significant directive Mr. Guarnieri did not comply with after receiving a reprimand was the one to submit a written list of job duties. However, Mr. Guarnieri never fulfilled the requests of Council, as transmitted by the Borough Secretary, to complete inspection of a garage and to furnish a training report. He continued to ignore discrepancies between police schedules and police timecards, making it difficult to audit expenditures (Union Exhibit 1, pp. 45-46). Over a period of time he also displayed a non-cooperative attitude and a general reluctance to comply with requests and directives.]

Were the proven charges sufficient to warrant just cause for termination? The record reveals, that Mr. Guarnieri received but three written reprimands, with two of those issued on consecutive days. According to Ms. Dommes, after Mr. Guarnieri received the first two reprimands, he complied with the directive not to schedule extra police officers (Union Exhibit 1, p.27). The Borough notified Mr. Guarnieri on De-

cember 16, 2002 that he was receiving a written reprimand for failing to furnish a written statement of job duties and that continued failure "will result in further action being taken by Borough Council against you" (Borough Exhibit 16). Council took no further action on this matter until it terminated Mr. Guarnieri. Certainly some of the other proven charges cited by the Borough warranted timely investigation and could have been the basis of discipline. By not doing so, Council members individually and as a group may have contributed to Mr. Guarnieri's attitude and actions. They elected to overlook matters that should have raised alarm and that were grounds for possible discipline. Budgetary concerns and Mt. Guarnieri's local relationships were not an excuse for their negligence. Council also included charges in the reasons for Mr. Guarnieri's dismissal that were outdated. Council thus weakened the case for terminating the employment of Mr. Guarnieri. Had the Borough investigated each allegation against Mr. Guarnieri in timely fashion and used progressive discipline when it found violations, it would have strengthened its position that the termination was for just cause.

There remain for consideration the numerous procedural questions of the Borough's handling of Mr. Guarnieri's case. The Police contended that the alleged procedural issues were serious enough to overturn the discharge action, regardless of the outcome of the substantive matters. No factual disagreements exist in the matters regarding procedural questions. The question raised is whether the al-

leged errors are sufficiently egregious to affect the outcome.

It is undisputed that the Borough effectively denied Mr. Guarnieri representation at the meeting on January 10, 2003. When Mr. Guarnieri entered the meeting, he inquired about the nature of the discussion, after which he asked for legal and Police representation. The meeting was to investigate Mr. Guarnieri's conduct as Chief of Police, with discipline as a possible result. Mr. Guarnieri was clearly entitled to representation under such circumstances. The Borough erred in denying him his Weingarten rights to representation. It is also clear, however, that the Borough obtained no new information at this meeting and did not rely on Mr. Guarnieri's behavior at this meeting to justify his termination. The most the Police can claim is that he was deprived of an opportunity to tell his side of the story with a representative present, but representation likely would not have changed anything. No reason was offered why I should not accept the finding of the Pennsylvania Labor Relations Board, PF-C-030210E, and affirmed by Commonwealth Court of Pennsylvania, 2004 WL 236194.

The lack of representation for Mr. Guarnieri at the meeting on February 7, 2003 is more serious to my mind. The purpose of the meeting was to obtain testimony from Council members about Mr. Guarnieri's performance to determine if he deserved discipline. A representative for Mr. Guarnieri could have questioned witnesses and perhaps guided Mr. Guarnieri through a presentation of his defense. Mr.

Guarnieri's legal counsel had given notice a week prior to the scheduled meeting that he would be unable to attend, with a request for continuance until later in the month. No persuasive justification was offered for not rescheduling the meeting. If Council had been concerned about Mr. Guarnieri acting as Chief of Police in the interim, it could have suspended him pending the outcome of the disciplinary meeting. Perhaps the presence of Mr. Guarnieri's counsel would not have affected the outcome, but proceeding with the meeting when adequate notice of counsel's absence had been given was a grave breach of due process.

The Police objected to Council acting as prosecutor and judge in this matter. Six of the seven members of Council testified at the meeting of February 5, 2003. In truth, however, the final three Council witnesses were brief and did not introduce any negative evidence; in the contrary, one was decidedly complimentary to Mr. Guarnieri. The fact remains that Council has the authority to hire and discharge the Chief of Police and thus was empowered to make the decision on Mr. Guarnieri's fate. Given that Council unanimously voted to discharge Mr. Guarnieri on February 7, 2003, it would have made little difference if one or more individual Council members had disqualified themselves from the final decision.

The Police noted that the letter of termination (Joint Exhibit 2) lacked citations to the Borough Code or the Police Tenure Act, as required by Article 17 of the Agreement. It is incontrovertible that the letter

contains no specific citations. Yet it is not difficult to find among the reasons set forth in the letter the corresponding paragraphs in Section 46190 of the Borough Code, e.g., (2) neglect or violation of any official duty, and (4) inefficiency, neglect, intemperance, immortality, disobedience or orders, or conduct unbecoming a police officer. In some ways the reasons in the letter provide more substance and detail than do the reasons in the Borough Code. As far as I am concerned, the absence of citations was more a technical mistake than a meaningful violation of due process.

Another procedural problem raised by the Police was Council's letter in the newspaper on March 16, 2003 (Police Exhibit 3). Members of Council may have been upset by rumors, innuendoes and community reactions to its handling of Mr. Guarnieri, but pique is insufficient justification for a public written statement. Since the letter appeared more than a month after Council's decision to terminate Mr. Guarnieri, it had nothing to do with whether or not just cause existed for the termination. Nevertheless, the Police could properly object to Council making public comment about the disciplinary action. Publication of the letter was a violation of Article 26 of the Agreement.

To summarize, only two procedural objections raised by the Police were truly serious enough to possibly affect the outcome of this proceeding. The first was the failure to postpone the meeting of February 7, 2003 in order that Mr. Guarnieri's counsel could be present. Given the circumstances, the Borough made no attempt to accommodate a reasonable request

from Mr. Guarnieri for representation at the meeting. The failure to allow such representation was a fundamental violation of Mr. Guarnieri's due-process rights and could have affected Council's decision to discharge Mr. Guarnieri. The second significant procedural violation was the publication of a letter by Council commenting on reasons for Mr. Guarnieri's termination, a clear violation of the Agreement. These two procedural matters are different in nature and even in degree of significance. Perhaps neither one alone nor the two together would have set aside a strong substantive case against Mr. Guarnieri, but by the same token they cannot be excused without consequence.

In considering the issue of just cause in this case, it is evident that the Borough encountered problems in both the substantive merits and the procedural aspects. The evidence shows that Mr. Guarnieri was guilty of using tactics to evade, if not defy, the authority of Borough Council can of attempting to intimidate Council members. Certainly his conduct deserved discipline. Mr. Guarnieri had received three written reprimands, with the first two correcting the specified unacceptable behavior. No major violation occurred between the last reprimand and the termination action. Council has every right to expect any Chief of Police to follow its policies and directives and to abide by budget constraints. At the same time, Council must confront unacceptable conduct when it occurs and utilize discipline in a manner that conveys to employees its expectations and the consequences of not doing so. For the most part that was not done in this case. Moreover, in initiating and

completing the termination, Council committed significant procedural errors, which further weakened the Borough's position. Mr. Guarnieri's behavior cannot be condoned and is worthy of discipline, but the Borough has failed to prove it had just cause for its decision to discharge Mr. Guarnieri on February 7, 2003.]

Award

[The Borough did not have just cause to terminate the employment of Charles J. Guarnieri, Jr., on February 7, 2003. The Borough shall reinstated Mr. Guarnieri to his position as Chief of Police within 30 days of this award. Further, the Borough shall pay Mr. Guarnieri the basic salary of Chief of Police from February 7, 2004, less any pay he received from other employment since then. The time between February 7, 2003 and February 6, 2004 shall be regarded as a disciplinary suspension.

/s/
J. Joseph Loewenberg
Arbitrator

December 28, 2004

Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

Phone: (570) 655-2829 Fax: (570) 457-4792
Duryea Borough
315 Main Street — Duryea, PA 18642
Lois Morreale
Borough Secretary-Treasurer

January 21, 2005

Charles Guarnieri
312 Main Street
Duryea, Pa. 18642

Dear Mr. Guarnieri,

The Duryea Borough Council has issued the following directives to which you must follow:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.
2. You are not to attend council meeting as the chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed for your department.
4. The dayshift office must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly written report.
5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be handed in on Monday.
6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directives which you receive from either the borough solicitor or the borough secretary should be treated as a directive of borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or the borough solicitor.
7. You will submit a weekly report to the borough secretary on the following Monday by 1:00 p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the time at which the tasks were performed.

In addition, you will include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.
9. The police car is to be used for official business only. Only borough officials and passengers of officials business only are allowed in the police car.
10. The Duryea municipal excerpt from this smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.
11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00 a.m.-3:00 p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

Sincerely,

/s/

Lois Morreale
Borough Secretaty

Cc: Mayor Moss

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES J. GUARNIERI, JR.	CIVIL ACTION — LAW
Plaintiff	
v.	JURY TRIAL DEMANDED
DURYEA BOROUGH, DURYEA BOROUGH COUNCIL, ANN DOMMES, Individually and in her Official Capacity as Council President, LOIS MORREALE, Individually and in her Official Capacity as Borough Secretary FRANK GROBLEWSKI, Individually and in his Official Capacity as Councilman, EDWARD ORKWIS, Individually and in his Official Capacity a s Councilman, ROBERT WEBB, Individually and in his Official Capacity as Councilman, AUDREY YAGER, Individually and in her Official Capacity as Councilwoman, JOAN ORLOSKI, Individually and in her Official Capacity as Councilwoman, AKULONIS, Individually and in his Official Capacity as Councilman	
Defendants	NO.

COMPLAINT

NOW comes the Plaintiff, CHARLES J. GUARNIERI, JR., by his attorney, Cynthia L. Pollick, Esquire, and files the following Complaint against Defendants and avers as follows:

PARTIES

1. Plaintiff, CHARLES J. GUARNIERI, Jr., presently resides in Luzerne County. Plaintiff GUARNIERI (hereinafter referred to as "CHIEF GUARNIERI" is the Chief of Police for Defendant, DURYEA BOROUGH (hereinafter referred to as "DURYEA") and was deprived wages, employment opportunities, which in-effect is a demotion, and his rights of free speech were infringed upon on January 21, 2005, and continuing thereafter, after being reinstated pursuant to an Arbitration Award overturning the Defendants' decision to terminate his employment as Chief of Police in 2003.

2. CHIEF GUARNIERI has been a dedicated law enforcement officer for over 20 years competently and tirelessly serving the citizens of Luzerne County. Before accepting the position of Chief of Police of Duryea in September 2000, CHIEF GUARNIERI was employed with the Pittson Township Police Department for 17 years.

3. CHIEF GUARNIERI seeks redress for violations of his constitutional rights of due process, including but not limited to the fact that CHIEF GUARNIERI was never given a pre- or a post-

deprivation hearing. CHIEF GUARNIERI seeks redress for violations of his First, Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983.

4. Defendant, DURYEA BOROUGH, is a Commonwealth municipality with a principal office at 315 Main Street, Duryea, Pennsylvania.

5. Defendant, DURYEA BOROUGH OF COUNCIL is a part of the Commonwealth municipality of the Borough of Duryea, and operates out of 315 Main Street, Duryea, Pennsylvania.

6. Defendant, ANN DOMES, is the President of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

7. Defendant, LOIS MORREALE, is the Borough secretary of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

8. Defendant, FRANK GROBLEWSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

9. Defendant, EDWARD ORKWIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

10. Defendant, ROBERT WEBB, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

11. Defendant, AUDREY YAGER, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

12. Defendant, JOAN ORLOSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

13. Defendant, ALFRED AKULONIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

14. At all times material hereto, Defendants, DURYEA BOROUGH OF COUNCIL, DOMMES, MORREALE, GROBLEWSKI, ORKWIS, WEBB, YAGER, ORLOSKI, AKULONIS were servants, agents, and/or employees of Defendant Borough of Dunmore, and were acting under color of state law when they engaged in official policy, custom, and decision to deprive CHIEF GUARNIERI of his right to free speech and his right not to be harmed in absence of "just cause".

JURISDICTION

15. This suit is brought and jurisdiction lies pursuant to the 42 U.S.C. § 1983 for constitutional violations of CHIEF GUARNIERI's rights to pur-

suant to the First, Fourth and Fourteenth Amendments.

COUNT I

VILOATION OF CHIEF GUARNIERI'S CONSTITUTIONAL RIGHT TO DUE PROCESS PRE- AND POST-DEPRIVATION RIGHT PLAINTIFF V. DEFENDANTS

16. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through fifteen (15) above as if set forth herein at length.

17. On January 21, 2005, CHIEF GUARNIERI was reinstated pursuant to an Arbitrator's award after a long struggle with Defendants who terminated his employment in 2003.

18. Defendants vigorously opposed CHIEF GUARNIERI's return through the arbitration process.

19. Upon his return, Defendants restricted CHIEF GUARNIERI in his job duties, speech, opportunities for wages as well as disciplined in retaliation for him petitioning the government, his association with the union, and speaking out against Defendants on matters of public concern. The actions of Defendants in restricting his job duties, in essence, was a demotion.

20. Defendants provided CHIEF GUARNIERI with a list of restrictions. The laundry list of restrictions included but not limited to "you are not to attend council meeting as the chief of police...",

"you are to go home at the end of your eight hour shift", "you must patrol 4-5 hours during your eight hour shift", "you are not to work more than eight hours per day or more than 40 hours per week unless you receive express permission from borough Council", and must submit weekly report of "...detailed description of your daily activities".

21. Obviously, Defendants were restricting CHIEF GUARNIERI's job performance by placing ridiculous, unprecedented, humiliating requirements on CHIEF GUARNIERI, which were not part of the CBA and violated the terms of CHIEF GUARNIERI's employment and were placed on him in retaliation for him exercising his unconstitutional rights.

22. CHIEF GUARNIERI's position was and is protected by the Collective Bargaining Agreement (hereinafter "CBA").

23. CHIEF GUARNIERI did nothing to cause Defendants to retaliate against him.

24. Despite the fact that CHIEF GUARNIERI could only be harmed for "just cause", Defendants still infringed on his rights of free speech, his opportunity to make a living, and restricted his engagement in other activities which were and are an employment benefit to him as well as formally disciplining him.

25. CHIEF GUARNIERI has been continually harassed by Defendants.

26. CHIEF GUARNIERI has a property interest in his position as a Chief of the Police Department.

27. Defendants never gave CHIEF GUARNIERI oral or written notice why his right to free speech and opportunity to make a living was infringed, he was disciplined, and prohibited from engaging in activities which are an employment benefit to him.

28. Defendants never prohibited CHIEF GUARNIERI with a pre-deprivation hearing, or any post-deprivation hearing as required by law.

29. Defendants have intentionally failed to provide CHIEF GUARNIERI with any hearing of or notice of charges, and therefore, have deprived CHIEF GUARNIERI of his constitutional right to pre- and post- deprivation hearings.

30. Defendant Duryea Borough was deliberately indifferent to CHIEF GUARNIERI's rights, and intentionally failed to train its employees adequately, and also failed to have policies in place prohibiting the conduct in question.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT II
FIRST AMENDMENT RETALIATION CLAIM FREEDOM OF PETITION AND SPEECH PLAINTIFF V. DEFENDANTS

31. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty (30) above as if set forth herein at length.

32. CHIEF GUARNIERI petitioned the government by filing several grievances against Defendants.

33. CHIEF GUARNIERI also engaged in speech on Police and Union matters with Defendants once he was finally reinstated.

34. CHIEF GUARNIERI was retailed for filing grievances and engaging in free speech by being criticized, denied employment opportunities, harassed, disciplined, restricted in speech as well as restricted in his ability to perform his hob duties, which in essence, is a demotion.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT III
VIOLATION OF SECTION 1983 FIRING IN RETALIATION FOR CHIEF GUARNIERI'S ASSOCIATION WITH THE UNION PLAINTIFF V. DEFENDANTS

35. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty-four (34) above as if set forth herein at length.

36. CHIEF GUARNIERI was affiliated with the Fraternal Order of Police, and assisted the union in matters.

37. Defendants were fully aware of CHIEF GUARNIERI's association with the Fraternal Order of Police, and in retaliation for the same harmed him as described above.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

A jury trial is demanded on all counts.

By: s/Cynthia L. Pollick
Cynthia L. Pollick, Esquire
Pa. I.D. No.: 83826
Greater Pittston Professional Center
126 S. Main Street, Suite 201
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Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

AMERICAN ARBITRATION ASSOCIATION

* * * * * * * * * *

In the Matter of Arbitration
between

THE DURYEA BOROUGH
POLICE DEPARTMENT

- and -

BOROUGH OF DURYEA

GRIEVANCE:
Directives
Grievance

AAA CASE NO. 14 3-0 00419
05 RVB

* * * * * * * * * *

JURISDICTION, BACKGROUND and POSITIONS OF THE PARTIES

This matter arises from a Grievance (dated January 29, 2005), initiated on behalf of Charles J. Guarnieri, Jr. (the Grievant), Chief of Police (Chief or Chief Guarnieri) of the Borough of Duryea (Luzerne County), by his exclusive bargaining agent, THE DURYEA BOROUGH POLICE DEPARTMENT (a/k/a Duryea), a public employer (Borough or Employer). The Bargaining Unit consists of the Grievant and two (2) other full-

time police officers (Joint Exhibit 6A – Pennsylvania Labor Relations Board Examiner's Decision No. PF-C-03-21-E, December 11, 2003, 34 PPER P 158, LRP at 2).

This Grievance claims that on January 21, 2005, the Borough secretary issued a "Directive" containing 11 points, each of which the __ion claims ". . . changed existing, established and recognized past practices as well as changed the terms and conditions . . . [of the Chief's employment] . . . ." (Joint Exhibit 3 at 1). The Grievance was not resolved in the Grievance procedure.

The Police appealed this matter to arbitration on March 3, 2005 and demanded that as the remedy the Borough Council be ordered to withdraw the Directive, return to the "status quo prior" to the issuance of the Directive, and not to discriminate against the bargaining unit and its members in the future.

The Borough denied the Grievance because "it is unclear how the directives which you [the Union] contest have altered past practice . . . " [or violate the collective bargaining agreement] (Joint Exhibit 3 at 4).

Hereafter, either the Borough or Police may be referred to as a "Party;" and when referring to both, they may be referred to as the "Parties."

Arbitration Hearings were held on July 19, and September 12, 2005, in Duryea borough,

Pennsylvania, in the Duryea Municipal Building, before Edward A Pereles, the Arbitrator selected by the Parties (under the terms of their Collective Bargaining Agreement (CBA) and their Settlement Agreement (Agreement)) and the then current (July 1, 2005) Rules (the Rules) for Labor Arbitration of the American Arbitration Association (AAA) to hear the matter, to issue rulings, and to render an Award with an Opinion on the Issues placed before him.

The Bargaining Unit was represented by Anthony M. Caputo, Esquire, and the Borough by Scott E. Blissman, Esquire. There was no challenge to substantive or to procedural arbitrability by the Parties and they agreed that the matter would be heard on the merits.

One or both of the Parties asked the Arbitrator to become familiar with the pertinent provisions of Articles 1, 11, 15, 16 and 18 of the CBA (in effect from January 1, 2003 through December 31, 2003 (Joint Exhibit 1)); modified and extended by a "Settlement" Agreement (and Items 5. and 6. therein) effective "January 1, 2004 and continuing through December 31, 2005" (Agreement) (Joint Exhibit 2); "Relevant Portions of the Borough Code from Chapter 91, 53 P.S. Section 46121 (Joint Exhibit 7); and the Directive(s) (sent to "Mr." Guarnieri on Borough stationery, dated January 21, 2005, signed by Borough Secretary Lois Morreale (on behalf of the Duryea Borough Council)) (Joint Exhibit 4).

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1
BARGAINING UNIT

The Borough as it has in the past recognized the Duryea Borough Police Bargaining Unit as the sole representative of all full time police officers. The Borough shall not discriminate against a member of the bargaining unit, or try to discourage membership in said bargaining.

ARTICLE 11
STATE AND FEDERAL LAW

Nothing in this agreement shall be construed to require either of the parties to act contrary to any state or federal law. In the event any such condition arises, it is agreed that this agreement shall be deemed to be modified to the extent necessary to comply with such law(s). All other provisions shall continue in force.

ARTICLE 15
SHIFT SCHEDULES AND SHIFT CHANGES

1st – 7:00 a.m. (0700 hrs.) to 3:00 p.m. (1500 hrs.)
2nd 300 p.m. (1500 hrs.) to 11:00 p.m. (2300 hrs.)
3rd 11:00 p.m. (2300 hrs.) to 7:00 a.m. (0700 hrs.)

Overlap shifts 7:00 P.M. (1900 hrs.) to 3:00 A.M. (0300 hrs.) are to be used any 4 nights every week without exceptions. Other overlapping

shifts may be used at the discretion of the Chief of Police with prior approval from Council.

ARTICLE 16
GRIEVANCE PROCEDURE

GRIEVANCE PROCEDURE: A grievance shall be defined as any dispute involving the interpretation and/or application of the terms of this Agreement, or any dispute involving the interpretation and/or application of the Borough's policies or procedures which affect the terms and conditions of employment, including matters of discipline. . . . . .

. . . . . .

The arbitrator shall neither add to, subtract from, nor modify the provision of this agreement or of the arbitration awards. The arbitrator shall confine him/herself to the precise issue submitted for arbitration and shall have no authority to determine any other issues not so submitted to him/her.

The decision of the arbitrator shall be final and binding on both parties. The arbitrator shall be requested to issue his/her decision within thirty (30) days after the hearing or receipt of the transcript of the hearing. The period may, however, be waived by the parties or at the request of the neutral arbitrator as circumstances warrant.

. . . . . .

All fees and expenses for the neutral arbitrator shall be paid for by the employer.

ARTICLE 18
PAST PRACTICE

All existing benefits and practices previously enjoyed by the members of the Collective Bargaining Unit and the Borough and not modified by this Agreement shall remain as is.

SETTLEMENT AGREEMENT

5. **Discharge, Suspension or Demotion (Article 17)** Article 17 shall be deleted and replaced with the following amended language:

> *No full-time police officer covered by this agreement shall be discharged, suspended or demoted except for "just cause" as defined in the civil service provisions of the Pennsylvania Borough Code, 53 P.S. Section 46190.*

6. **As Is** Anything not changed in the expired collective bargaining agreement between the parties shall remain as is and in effect for the duration of this Agreement.

RELEVANT PORTION OF THE BOROUGH CODE

Chapter 91, 53 P.S. Section 46121

Borough council may, subject to the civil service provisions of this act, if they be in effect at the time, appoint and remove, or suspend, or reduce in rank, one or more suitable persons, citizens of the United States of America, as borough policemen . . . .

The borough council may designate one of said policemen as chief of police. The mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties, except that council shall fix and determine the total weekly hours of employment that shall apply to the policemen.

. . . .

The borough may, by ordinance, establish a police department consisting of chief, captain, lieutenant, sergeants, or any other classification desired by the council, and council may, subject to the civil service provisions of this act, if they be in effect at the time, designate the individuals assigned to each office, but the mayor shall continue to direct the manner in which the persons assigned to the office shall perform their duties. The mayor may, however, delegate to the chief of police or other officers supervision over and instruction to subordinate officers in the manner of performing their duties. The mayor may appoint special policemen during an emergency in which the safety and welfare of the borough and the

public is endangered and auxiliary policemen may be appointed as provided by general law.

. . . .

THE DIRECTIVES (January 21, 2005)

The Duryea Borough Council has issued the following directives to [sic] which you must follow:

1. Your daily shift consists of eight hours. You are not to work more than eight hours per day or more than forty hours per week unless you receive express permission from Borough Council. You are to go home at the end of your eight hour shift.

2. You are not to attend council meetings as the Chief of police and will not be paid for attending council meetings. You may only attend as a citizen.

3. You must follow the purchase order system. You personally will be responsible for getting all purchase orders signed by your department.

4. The dayshift officer must observe the arrival and dismissal times of the Holy Rosary School. Hours are 7:45a.m.-8:20a.m. and 2:00p.m.-2:30p.m. This has become a daily practice and must be continued. Any reason that this is not completed must be in writing and included in your weekly report to be handed in on Monday.

5. You must patrol 4-5 hours during your eight hour shift. Proof of patrol will be a copy of the daily mileage log. Therefore, a copy of the daily mileage log of all shifts must be included with your weekly report to be handed in on Monday.

6. Council will issue directives to the borough secretary and to the borough solicitor. Any borough council directives which you receive from either the borough solicitor or the borough secretary should be treated as a directive of borough council. Accordingly, you are required to follow any and all directives given to you by borough council, whether directly, or indirectly through the borough secretary or borough solicitor.

7. You will submit a weekly written report to the Borough secretary on the following Monday by 1:00p.m. This report shall include a detailed description of your daily activities, including the task of patrolling the Holy Rosary bus stop. Proof of your activities shall include the starting and ending mileage on the patrol vehicle for the time in which you are patrolling.

8. A copy of the monthly schedule for the police department must be given to the borough secretary by the first of the month.

9. The police car is to be used for official business only. Only borough officials and passengers of officials business [sic] only are allowed in the police car.

10. The Duryea municipal building is a smoke free building. The police department is not exempt from this smoking ban. Random checks will be done to insure that the building is smoke free. You will be held responsible for your department to adhere to the no smoking regulation.

11. As Chief of Police, you are to work the dayshift, which is Monday through Friday 7:00 a.m.-3:00p.m. As your employer, Duryea Borough Council wants our Chief of Police to be visible and accessible to the public during the dayshift hours.

As background: The Borough, Borough Council and the Mayor are creatures of the laws of the Commonwealth of Pennsylvania (See Chapter 91, 53 P.S. Section 46121). The Union, as the employee representative, is also a creature of the Commonwealth. Each of the above has limited powers, rights and duties.

This matter arises on the occasion of the Grievant's return to work on January 21, 2005. The circumstances surrounding that return to work and the predicate discharge are fully explored by Arbitrator J. Joseph Loewenberg in his Award (the Loewenberg Award) dated December 28, 2004 (AAA Case No. 14 390 00720 03) which is Joint Exhibit 5 in this matter. The Award returned the Grievant to his position as Chief of Police with substantial discipline and substantial back pay.

This Grievance is not a grievance about discipline as there are no allegations that the Chief of

Police has failed to follow the "Directives" authored by Borough Council and issued at the time the Grievant was returned to work. Rather, this Grievance challenges the authority of the Borough Council to issue such Directives.

There lurks in this matter and is discussed in the Loewenberg Award two 92) underlying issue: the demarcation of a line or lines establishing the Borough Council's overall fiscal authority and its authority to establish various ranks and duties for the Police Department. The second issue is the demarcation of a line or lines of the Mayor, also charged with duties and authority and specific to provide police protection to Duryea's residents and visitors and charged with the day to day operations of the Police Department.

In many municipalities there is less need for clarity as apparently is required in this Borough; and while I am not charged with exploring why such a high level clarity is needed, I cannot overlook this need for clarity either, especially as it applies to these Directives. By "*clarity*" I mean both the process by which words are authorized and the actual words used to communicate meaning.

However, based upon the exhibits and arguments submitted to me, these lines (by statute, regulation or case law) are not as clear as either the Borough Council or the Union (and Police Chief) either believes or might like to believe. But there is no question that the Borough Council (1)

". . . has the authority to hire and discharge . . ." (Joint Exhibit 5, the Loewenberg Award at 20) officers in the Police Department, consistent with the CBA, and (2) has responsibility for all fiscal matters relating to the Borough (Chapter 91, 53 P.S. Section 46121 (Joint Exhibit 7)).

It is the position of the Police that the Borough Council violated the collective bargaining agreement when on January 11, 2005, it issued a series of eleven (11) Directives to the Chief of Police, a member of the bargaining unit. The Directives ". . . changed existing, established and recognized past practices; they change the terms and conditions of my employment; . . . and apply to me and no other officer."
(Joint Exhibit 3 at 1).

Articles 1 and 18 make clear that the Borough is prohibited from discriminating against a member (of the bargaining unit) or modifying a past practice. Further, a review of each and all the Directives reveals that each and all Directives were either imposed (1) to retaliate against Chief Guarnieri on the occasion of his being returned to work after an Arbitrator overturned a wrongful termination or (2) to apply only to him. Under these conditions not ". . . not a single directive survives the contractual protections afforded by Article 1 and 18" (Police Brief at 6).

For all of the above reasons, the Union respectfully requests that the Grievance be sustained and all of the Directives be rescinded.

It is the position of the Borough that the Union did not, and cannot, demonstrate through relevant and material evidence that it violated the CBA. The Borough wishes to remind the Arbitrator, that it is not the borough that has the burden of proof in this matter Nevertheless, the Borough will explain why it did not violate the CBA. The Borough ". . . clearly articulated and established the reasons why the directives which it issued were reasonable in this case" (Borough Brief at 20).

First, it is mandated by law, and supported by case law, that the Borough and the borough alone, is responsible for the affairs of Borough. The Borough has the obligation to the taxpayers, non-taxpayer residents and visitors to maintain fiscal responsibility in the Borough and over the borough's Police Department. Thus, the Police Chief (and the Union) bears the burden ". . . of demonstrating [that] the directives violated a section of the collective bargaining agreement or were otherwise prohibited or in excess of the Borough authority (Borough Brief at 9). Guarnieri also attempts to assert that the Directives are the Borough's way of ". . . attempting to intimidate or retaliate against him for filing a grievance regarding his termination" (Ibid.).

Second, when considering all the testimony and exhibits the Union did not establish any past practices or if there were any past practices established they developed in Mr. Guarnieri's absence.

The Directives are not discriminatory but rather the Borough Council's attempt to comply with the guidance given in the "Discussion" section of the Loewenberg Award (Joint Exhibit 5 at 10-23). From the post return to work behavior of Mr. Guarnieri, the Borough concludes that it is not really what was said in the Directives but the very fact that the Directives were issued. Mr. Guarnieri just does not want to be told what to do by anyone (Borough Brief at 9).

Past practices are an ". . . accepted course of conduct characteristically repeated in response to a given set of underlying circumstances." To establish a past practice Mr. Guarnieri has to show that the conduct alleged to be a past practice "was the customary manner in which the parties addressed a given issue" (Citations omitted, Borough Brief at 10).

The testimony shows that some of the alleged past practices are consistent with the language set forth in the CBA. Other Directives relate to Borough wide procedures (the purchase order system) or applications of general rules (no smoking). Police on patrol issues have been developed to protect the citizens of the Borough (such as patrolling the Holy Rosary School during its arrival and dismissal times); having the Chief work the day-shift as he had in the past (which the Chief acknowledges); and having the Police Chief on patrol and visible to those who pay his salary, not just sitting in his office.

As to how Directives are communicated, there was nothing different about what was Guarnieri was required to do. He is to receive Memos from Borough Secretary Morreale and have her be the information collection agent for Borough Council. The only changes that process made is making explicit, including dates, for Guarnieri and for the Union. This process was specifically acknowledged in the Loewenberg Award (at 16). From Arbitrator Loewenberg's Discussion, the Borough concluded that such instructions were required to establish "standards of conduct" (Borough Brief at 12-14).

Third, the Directives were not issued to retaliate against Guarnieri. The Directives were issued based on a close study of what the Borough failed to do or did not do as well as Arbitrator Loewenberg thought it should. Mr. Guarnieri is a unique individual. His suspension for a year for insubordination and misconduct was an "extraordinary' event in the Borough's history and his mandated return to work was also extraordinary. The Directives were developed and issued solely to establish the standards of conduct required so there would be "no confusion" about the Chief's duties (Borough Brief at 15). Anyone who reads these Directives would see that the Borough was not discriminating against Mr. Guarnieri or the Union nor violating any past practice.

Fourth, although the Union claims that the Mayor, not the Borough Council has day to day responsibility for the operation of the police, that

statement is just not accurate under the law; and Arbitrator Loewenberg agreed with the Borough's understanding of the law.

Fifth, the Directives are a lawful and reasonable exercise of the Borough's management rights. It is the Borough's position that Arbitrator Loewenberg decided this issue in a prior proceeding (Loewenberg Award). The issue having been decided, the Police Department may not relitigate it before a different arbitrator (See Loewenberg Award, Borough Brief at 16, fn 4).

The Mayor has limited responsibilities under the borough code. It is the borough that is the statutory employer of the Chief of Police. It is the borough that establishes the budget and insures that it is followed. It is the Borough that has the power to hire and fire. Not only does the Borough Code support this analysis but case law supports it (See Borough Brief at 17). Since all of the Directives "implicate" financial issues, each and all fall within the Borough's rights to issue them. These duties " . . . do not rest within the province of the mayor, but rather, based upon the case law . . . , are solely and exclusively within the province of a borough council (Borough Brief at 19).

Based on all of the above, the Grievance must be denied in its entirety "[b]ecause the Union failed to carry its burden in this case and because rational, logical reasons exist for the directives . . . "
(Borough Brief at 20).

On September 12, 2005, at the end of the evidentiary Hearing, the Parties informed the Arbitrator that they would be filing post-hearing briefs which they agreed would be submitted to and interchanged by the AAA postmarked no later than October 31, 2005, a date which was modified pending settlement negotiations between the Parties. These negotiations did not result in settlement. The parties then agreed that they would submit the post-hearing briefs to the AAA no later than January 9, 2006. The Hearing and record were declared closed on January 11, 2006, the date on which the AAA transmitted the Parties' post-hearing briefs to the Arbitrator and interchanged them with the Parties.

THE ISSUES

The Parties stipulated to the Issues in this matter s follows: Whether the Duryea Borough violated the CBA and/or the Settlement Agreement, when on January 21, 2005, it issued eleven (11) Directives to Police Chief Charles Guarnieri? If so, what shall the remedy be?

THE AWARD and OPINION

Based solely upon the record, the Arbitrator finds that Duryea Borough has violated the CBA in a number of ways in issuing (not just the act of issuing some of the Directives dated January 21, 2005, to Police Chief Charles Guarnieri. The Union failed to prove the Borough violated the CBA

when it issued other of the Directives, or parts thereof. Because the Union had the initial burden of persuasion, I have chosen to analyze the context of the issuance of the Directives (issued by the borough to establish a standard of conduct) as the point of entry for this Award and then to analyze each Directive. However, after considering both the context and the Directives, I find that the remedy demanded by the Union is overly board, all for reasons more fully discussed below.

Normally, deliberative actions taken by a Borough Council are considered to be consistent with statutory law, regulation and case law. The unexpressed but major premise of this matter is that under Article 11, "STATE AND FEDERAL LAW" and pursuant to the laws of the Commonwealth, the Borough Council (1) may issue Directives to the Chief of Police pursuant to its statutory authority and case law and in furtherance of its fiscal responsibility oversight; but (2) may not issue Directives to the Chief of Police which directly or indirectly usurp or interfere with the statutory authority of the Mayor to supervise the day-to-day operations of the Police Department. In addition it may violate any provision of the CBA.

However, before my examination of the specific Directives as the Stipulated Issue required, I must find that upon the issuance of my Award, future "Directives" (or instructions of any kind associated with the statutory authority of the borough Council regarding fiscal responsibility which might be issued to the Mayor and/or to the Chief

of Police, pursuant to a lawfully enacted ordinance or other appropriate record of action), must be transmitted s any other lawfully enacted Borough business. Directives must not be issued solely in a writing by a Borough employee without referencing an action taken formally or otherwise, by an individual, some members of or a majority of the members of Borough Council) (See Salopek v. Alberts, 417 Pa. 592, 596, 209 A.2d 295, 297 (1965) and Albano v. Civ. Serv. Comm. Of Boro of McAdoo, 13 Pa.Cmwlth. 333, 320 A.2d 385, 386 (1974). Without a record of when an action is taken and some evidence of the number of Council members who voted in the affirmative, how can the Union evaluate whether an action allegedly taken by Council has been taken by Council. Without that information, the Union cannot determine accurately whether it should or it should initiate a Grievance.

Before discussing my decision, I want to observe that there is neither a scintilla of evidence that Borough Secretary Morreale, a Borough employee, has not been faithful to the instructions from various Presidents of borough Council or, from some members, a majority of the members or all the members of Borough Council, nor has she decided matters in lieu of action of Borough Council; but hereafter when writing to the Police Chief (and thus to the Union), as has been the practice in the Borough (The Loewenberg Award at 16), the Chief (and the Union) must be assured that any Directive that issued to him (or it) is an authorized, accurate, and timely Borough Council

action in an area in which the Borough Council is statutorily entitled to act or required to act (See Article 11 of the CBA). To the extent that a writing is directed to the Mayor which would apply to the bargaining unit, the same analysis applies. This process is especially important because the Chief of Police pursuant to the January 21, 2005, Directives is prohibited from attending Borough Council meetings in his capacity as Chief of Police (See discussion concerning Directive 2 below).

In any event, Directives, instructions, etc., must contain the necessary protections for all entities, persons, etc., provided for by the statutory scheme in the Commonwealth. Failure to follow these steps may likely violate the CBA, especially in the area of wages, hours, working conditions and past practices.

Now, let us look at the January 21, 2005, Directives. Rather than conclude that the Directives issues on January 21, 2005 by the Borough Secretary on behalf of the Borough Council are invalid because they were not issued in a manner on which the Chief (and/or the Union) could rely, for purposes of this arbitration each Directive shall be considered as if each had been issued by Borough Council through the proper statutory procedure and thus were issued in a valid manner.

Therefore, without making a determination of the Borough Council's legal authority (which I am not required to do to answer the Stipulated Issues), there remains the basic question under the

Stipulation of Issues of whether the Borough Council violated the CBA in issuing any one, or part of any one, of the eleven (11) Directives.

In analyzing the Union's claims, i.e., that a Directive is either discriminatory against the Union and/or one of its members or that it modified a past practice which was enjoyed by the Union or one or more of its members, one must understand both the negotiated Agreement and the Settlement Agreement (Joint Exhibits 1 and 2) as it (they) applies to the Directive.

Directive 1: Obviously the Borough Council may set hours per day and per week for any Borough employee unless those hours discriminate against the employee. I do not find that the establishment of 8 hours per day and 40 hours per week under this CBA violates any provision thereof (See Article 15). However, if that part of Directive 1 requiring express permission of Borough Council to work beyond 8 hours per day or 40 hours per week, impinges on the Mayor's duties to operate the day to day aspects of the Police Department, that prohibition must fall.

In particular, this prohibition as it is written could interfere with the pursuit of ongoing criminal activity. However, in this Borough, it would not be expected that such an occurrence would happen often, especially on the dayshift. Nevertheless, providing permission cannot be secured in advance, the Mayor may determine that the Chief is needed to perform duties when an additional of-

ficer is required and cannot be procured. Assignments, how4ever, should be made recognizing the Borough Council's fiscal responsibility. As to the final sentence of Directive 1, it is clearly beyond the authority of Borough Council, as its attorney acknowledged, and the Borough President agrees, to require that any employee must "go home" at the end of his or her shift.

Directive 2. While it may be advantageous for all citizens of the Borough to attend Borough Council meetings, if the Chief's presence is not required, then he cannot claim pay for his attendance. On the other hand, when the Chief's presence is required, he must be paid. If he chooses to attend as a private citizen, he is not attending as a required duty for which compensation is appropriate. Therefore, to the extent that the Chief of Police might be required to attend a Council meeting(s), then he must be compensated. To that limited extent the Borough Council went beyond its authority, under the CBA, to prohibit payment.

Directive 3. The requirement that department heads follow a uniform purchase system is on its face neither discriminatory nor a violation of a past practice. However, to be held personally responsible for getting all purchase orders signed, may be discriminatory, if all other department heads are not held to the same standard. Furthermore, even if the Chief and the other department heads were to be held personally responsible, it is not clear that any disciplinary action could be taken because the words "personally re-

sponsible" are not defined. This phrase requires clarification.

Directive 4. The absolute requirement contained in the first two sentences may interfere with other duties required of the dayshift officer or the Mayor's direction of the manner in which the persons assigned to the various offices (ranks) shall perform their duties. In addition, by setting forth the hours when the dayshift officer must be at the school, the Directive may not accomplish what the Borough Council intends, especially on opening or closing days, on special event days, on weather days, etc. Since the school is the only one located within the Borough and the school is located close to the major thoroughfare of the Borough, many of the Borough's children can be protected from potential accidents by the presence of police department personnel. The testimony reveals that having a police presence at the school during the students arrival and dismissal times is an important duty. It is neither discriminatory nor a violation of a past practice to have the Borough set forth the goal of having a police presence at the school but the detail of how this presence is operationalized is, again, a responsibility of the Mayor, not Borough Council. Nevertheless, the borough Council is entitled to know whether this duty is being performed. Under this Directive, however, it is not clear whether the Borough Council is concerned about arrival and dismissal times or whether it is the specific hours that must be reported. To the extent that what the Borough Council wants to have happen is unclear, this Di-

rective must be made clear so that the dayshift officer and the Mayor know what to report. Setting a date or day of the week for a report is neither discriminatory nor a violation of past practice.

Directive 5. The "specific" goal established that "you" patrol 4-5 hours per day is aspirational in the guise of an order. Under the Directive, it appears that patrolling requires use of a patrol car since the only measurement set forth is the "daily mileage log." But, in police work, patrolling can also mean patrolling by foot or patrolling by use of an alternate vehicle if undercover work is called for. While the Borough Council can set the duties of the various ranks, tit is constraining to say how daily patrol duties must be performed by the Chief. It also appears that this Directive is designed to require the Chief to be out of his office 4-5 hours per day, on patrol, which may not allow him time to perform other critical police duties without incurring overtime. Consistent with Directive 4, setting a date or day of the week to turn in the daily mileage log is neither discriminatory nor a violation of past practice.

Directive 6. Providing appropriate legal notice is met and is referenced in any communication Directive, order, etc., and that notice of the Directives validity may be confirmed by the Mayor or Chief, such Directive, orders, etc., may be issued by the Borough Secretary or by the borough solicitor as the past practice provides. When issued as above, (1) such Directive, order, etc., shall be treated as a Directive, order, etc., legally autho-

rized by Borough Council and (2) shall be followed. If there is some question about an issue covered by the CBA, the question may be grieved under the negotiated procedure set forth in Article 16, Para 1. No action taken by Borough Council discussed in this section violated the CBA. Future actions taken by Borough Council can be grieved if the Union determines that they are discriminatory or in violation of a past practice.

Directive 7. The Borough Council may require appropriate reports from time to time and/or by a specific time from its Chief of Police providing such reports relate to Borough Council's stated objective, e.g., fiscal integrity of the Police Department. While not a violation of past practice, collecting activity information about a single member of the Police Department, may be a discriminatory event, especially when it does not request or require similar information in Directives 4. And 5 from other police officers.

Directive 8. The Union failed to provide any evidence that requiring a monthly schedule for the Police Department to be provided to the Borough Secretary violates Article 1 or 18, as long as the report is provided by a date certain. However, if Borough Council requires the monthly schedule on the 1st day of the month, Borough Council creates a conflict in how this report is to be provided on days when the Chief is not scheduled to work. If such a report is to be required, it should be submitted on the last day of the month that the Chief is scheduled for work, as the Directive ap-

pears to state. How the report is to be transmitted to the Borough Secretary should not require specific direction as long as the Chief is assured that his form of transfer get to the Borough Secretary in a timely manner.

Directive 9. Directive 9 is so poorly written that it is difficult to understand. If the Directive means that only Borough employees and elected officials may use police vehicles while engaged in Borough business, the Directive should say so. However, who takes responsibility if a police officer must transport (a) a citizen or resident as a result of an accident which happened within the Borough; (b) a female whose water breaks and who does not have transportation to a medical facility; or (c) any of a number of other appropriate scenarios. Finally, based on the evidence, the morning transportation of the Chief's child to school appears to have risen to the level of a past practice since such transportation was known to the Borough and the borough did not take any action to stop it. The underlying conditions did not change just because the Chief was disciplined and not at work. In this limited area, the Chief may continue to transport his child to school using the Police vehicle, providing such transport is required to take place when he is assigned to the dayshift and the transport is before or after the hours when the dayshift officer must attend the arrival and dismissal hours of the designated school (See Directive 4). This practice applies only to this child and the school which he attends and cannot be extended to other children or another school.

Directive 10. The evidence offered reveals that since the Municipal Building was dedicated, depending on who was elected to Borough Council, from time to time the building has been designated as smoke free. Further, there is no evidence that the Police Department was excluded from any smoking designation that was placed into effect. As I said in Directive 3 (relative to the purchase order system), as long as other department heads are held responsible for their department's actions, the Chief may be held responsible for his department's action (with the understanding that "personally responsible" is defined). And as long as other departments were subject to random checks to insure that the non smoking rules are followed, the Police Department may be subject to the same checks. If either of these conditions is violated, then it would appear that the borough ahs engaged in discriminatory activity against the Chief of Police or the Police bargaining unit. However, because employees continue to smoke, the Borough Council must provide some area under cover (although not inside) in which its employees may smoke.

Directive 11. This Directive is apirational and as such, less than enforceable While Borough Council may conclude that it is desirable for its Chief of Police to only work the dayshift Monday through Friday because he will be more visible and accessible to the public, there may be operational reasons for the Chief to work other hours and/or days. Just as there was no past practice that the Chief could only be assigned to the day-

shift; so too, he may not be so constrained in scheduling of his work that his police work suffers. However, as I said in my discussion of Directive 1, unless permission is granted to work otherwise, the Chief shall work dayshift as the Borough Council believes desirable. However, if the Mayor determines there is an operational necessity to work a different shift (which must be promptly reported to Borough Council), the Chief may be so assigned but that assignment shall be of limited duration.

While these Directives were ostensibly provided to guide the Chief of Police when he was returned to duty, each shall be clarified and reissued or withdrawn within ninety (90) days from the date this Award issued in a matter not inconsistent with the above discussion.

The Arbitrator shall retain jurisdiction for a period of one hundred twenty (120) days following the date this Award issues solely for the purpose of assisting the Parties in the implementation this Award. In addition, should either Party request my assistance regarding the implementation of this Award, it shall do so in writing to the Philadelphia Labor Center of the American Arbitration Association within the one hundred twenty (120) day period.

This Grievance is granted in part and denied in part.

/s/
EDWARD A. PERELES,
Arbitrator

Issued: February 15, 2006 at
Philadelphia, PA

Filed As Part Of The Record
In The United States District Court
For The Middle District of Pennsylvania

AMERICAN ARBITRATION ASSOCIATION

* * * * * * * * * *

In the Matter of Arbitration
between

THE DURYEA BOROUGH
POLICE DEPARTMENT

- and -

BOROUGH OF DURYEA

AAA CASE NO. 14 3-0 00419
05 RVB

GRIEVANCE:
Directives of
Grievance:
IMPLEMENTATION
OF AWARD

* * * * * * * * * *

JURISDICTION, BACKGROUND and POSITIONS OF THE PARTIES

By letter dated June 9, 2006, to the American Arbitration Association (AAA), **the Borough of Duryea** (Borough) invoked its right to request the Arbitrator's assistance in implementing the Arbitrator's Award dated February 15, 2006 (Award). Following the issuance of the Award, the Borough of Duryea (the Borough) prepared revised draft Directives (REVDIR, Attached as Exhibit A) which were ap-

proved by the **Borough of Duryea Police Department** (the Union). (See Letter to the Arbitrator dated June 2, 2006, with a copy to Union Counsel)

The Borough's letter to the AAA followed a brief conference call between the parties and the Arbitrator during which the borough gave notice to the Union and the Arbitrator that it would be seeking the Arbitrator's assistance in implementing his Award.

Pursuant to the terms of the Award,

> The Arbitrator shall retain jurisdiction for a period of one hundred twenty (120) days following the date this Award issues solely for the purpose of assisting the Parties in the implementation this Award. In addition, should either Party request my assistance regarding the implementation of this Award, it shall do so in writing to the Philadelphia Labor Center of the American Arbitration Association within the one hundred twenty (120) day period.
>
> (Award at 24)

By letter dated June 12, 2006, the AAA sought comment from the Union, if it wanted, on the Borough's invoking the Arbitrator's retained jurisdiction. By letter dated June 21, 2006, the Union stated that it "...opposes the Borough's request to have (the Arbitrator) issue or revise any Police Department directives." Additionally, during the brief telephone

conference call mentioned above, the Union indicated that the REVDIR are not consistent with the Award, should not be applied as revised, and should be withdrawn.

In responding to the positions of the Parties, I have carefully reviewed my Award and the draft REVDIR. As I understood the testimony offered during the Hearing, the two (2) main reasons for the Borough issuing Directives to Chief of Police, Charles J. Guarnieri, Jr., in January, 2005 (the original Directives are set forth in the Award at 6-8) were for (a) financial reasons, e.g., to drastically reduce Police Department overtime; to control purchases; and to control use of Police vehicles, etc.; and (b) operational reasons, e.g., to provide specific instructions to the Chief of Police; to provide an increased level of safety for children attending the school in the Borough; to better understand what work was being performed; and to ensure that the no smoking ban is uniformly applied to and throughout the Municipal Building.

In analyzing the Parties' positions, I note that in the main, the Borough's REVDIR attempted to follow the guidelines in the Award (at 15-24). However, there are elements of the language of the REVDIR which appear to create additional problems, such as a lack of clarity and consistency; and some aspects of the Award are not included in the REVDIR. I added the missing aspects; and grouped, merged and clarified the REVDIR. However, I have not revised the REVDIR. I have identified the result as the Award Directives (AWDDIR), which are set forth below.

These AWDDIR implicitly reject the Union's positions set forth above.

The first number in the AWDDIR is for identification and reference. The number(s) which follow (in parenthesis) are the numbers of the REVDIR. By issuing the AWWDIR, I am issuing a final Award, with all matters involving the Directives issues January 21, 2005, resolved.

However, the issuing of the AWDDIR does not limit the Borough Council's right to direct the Borough Secretary and/or the Borough Solicitor to issue Directives to the Police Department and to its Police Officers (the term Police Officers includes the Chief of Police) and to modify and withdraw any Directive providing when issuing a Directive the substance of the Directive is consistent with the Borough's grant of authority from the legislature of the Commonwealth and not inconsistent with the Collective Bargaining Agreement (Award at 15-17) and meets the requirements set forth below.

IMPLEMENTATION OF AWARD (AWWDIR)

1 (6) Any Directive received from the Borough Secretary or the Borough Solicitor shall be treated as a Directive from Borough Council providing the Directives indicates the date upon which the Directive was passed by a majority of the Borough Council. Before issuance, however, the language of each Directive shall be approved by a designated Borough Council member. When a Directive is issued to the Police Department or to any of its Officers, a

copy of the approved Directive shall be provided to the Mayor. The Police Department shall promptly implement and follow any and all such Directives.

2 (1) Daily shifts for Police Officers shall be eight (8) hours. Absent extraordinary or emergency circumstances, Officers shall not work in excess of eight (8) hours per work day or forty (40) hours per work week. If non-emergency overtime is necessary, it must be approved in writing by the Mayor before the overtime is worked. Written documentation of emergency overtime shall also be approved by the Mayor. This documentation must be promptly provided to the Borough Secretary by the Chief of Police (Chief).

3 (11) The Chief of Police shall be assigned to the day shift (7:00 a.m. to 3:00 p.m.), Monday through Friday. If a temporary operational need arises for the Chief to deviate from the assigned day shift and work days, Borough Council shall be promptly informed in writing by the Chief and the written report shall be submitted to the Borough Secretary. The report may be augmented by the Mayor. Included in these written reports shall be an explanation of the need for the deviation and an estimated time when the Chief can resume the Chief's assigned day shift and work days.

4 (8) On the first day of each month, no later than 1:00 p.m., the Chief of Police shall deliver to the Borough Secretary a copy of the work schedules for the month for each full time Officer. In the event that the Chief is not scheduled to work on the first

day of the month, the Chief shall deliver the schedule to the Borough Secretary on his/her last working day of the prior month.

5 (4) Except in the case of an emergency or an assignment by the Mayor, the day shift Police Officer shall be present at Holy Rosary School during the arrival and dismissal times of the students. As part of the day shift Officer's normal patrol duties, the day shift Officer should endeavor to patrol near school bus stops within the Borough prior to and subsequent to school arrival and dismissal times. Except in the case of an emergency or an assignment by the Mayor, the second shift Officer shall patrol (either on foot or in a police vehicle) around Healy Playground for approximately ten (10) minutes following school dismissal.

6 (7, 5 and 9) Each Police Officer must submit to the Chief of Police a daily log describing the Officer's work activities with sufficient detail to describe the tasks accomplished while on duty, including the location at which each task was performed and the time spent in performing each task. In addition, the daily log shall estimate the distances and time spent on foot patrol as well as clearly stating the beginning and ending mileage of the patrol vehicle and/or any other vehicle used for police business. Except for emergencies, police vehicles shall only be used for police business (with the exception of the past practice set forth in the Award at 22). The Chief shall prepare a daily log like any other Officer. The daily logs shall be kept on file by the Chief and be available for the review by the Mayor during the

work week. The Chief shall deliver all the daily logs to the Borough Secretary no later than 1:00 p.m. on Monday of the work week following the completed work.

7 (3) Each Police Officer shall follow the purchase order system. This system, in use throughout the Borough, requires that purchases be pre-approved. Failure to obtain pre-approval will result in the invoice for the purchase not being paid by the Borough and become the financial responsibility of the Officer who failed to obtain pre-approval. The Chief of Police is tasked with the duty of ensuring that that purchase order system is followed in the Police Department providing every other department head is tasked with this responsibility for his/her department.

8 (2) No Police Officer shall follow the purchase order shall be paid for attending Borough Council meetings except in the following situation: if a majority of Borough Council directs an Officer, in writing, to appear at a Borough council meeting in the Officer's official capacity, the officer will receive appropriate compensation for that appearance. Any Officer, however, may attend Borough Council meetings that are open to the public as a private citizen or resident but no compensation shall be paid by the Borough to any Officer attending any Borough Council meeting as a private citizen or resident.

9 (10) The Borough of Duryea's Municipal Building has been declared a smoke free building. The Police Department is located in the Municipal

Building and is also to be smoke free. However, the Borough has the obligation to establish a reasonably sized covered smoking area along side the Municipal Building for use by Officers who wish to smoke cigarettes. Until this covered area is established, a single room shall be identified within the Police Department footprint identified which may be used as a smoking area by the on-duty full time Officer. This room must have a door that fully closes. Once the covered area is created, the smoke free declaration shall apply to the room which has been set aside as the interim smoking solution.

/s/
EDWARD A. PERELES,
Arbitrator

Issued: July 3, 2006, at
Philadelphia, PA

EXHIBIT A

TO: Chief Charles Guarnieri
CC: Mayor Keith Moss
RE: Revised Directives

The following are revised directives to be followed by you and the other members of the Police Department. These directives have been approved by a majority of Borough Council. To the extent that any of the revised directives conflict with any of the original directives which you were issued, you and the other members of the Department are to follow the revised directives. Any questions which you may have regarding the application of the directives may be directed to the Borough Secretary.

1. The daily shift for all police officers shall be eight hours per day and forty hours per week. Absent extraordinary or emergency circumstances, officers shall not work in excess of eight hours per day or forty hours per week. If overtime is necessary, it must be approved in advance by the Mayor, except in the case of emergency. Written documentation of the Mayor's approval must be provided to the Borough Secretary as soon as possible.

2. No officer shall be paid for attending a Borough Council meeting in his/her official capacity unless directed in writing to attend such meeting by a majority of Council. Officers are free to attend any Council meeting in their individual capacity, but shall not be paid for such attendee.

3. All officer must follow the purchase system. Purchases must pre-approved by the Borough prior to making them. Purchases made by an officer outside of the purchase order system will not be paid by the Borough and shall be the sole financial responsibility of the officer.

4. Except in the case of emergency, the day shift officer shall be present at the Holy Rosary School to observe the arrival and dismissal of students. The day shift officer must indicate on his/her daily log the time spent discharging this duty or indicate what emergency, if any, prevented the performance of this duty. As part of the officer's daily patrol during the school year, an officer on duty normal typical arrival and dismissal of school should endeavor to patrol near the school bus stops within the Borough. In addition, the second shift officer should patrol (whether on foot or in a police vehicle) around Healy playground for approximately ten minutes on weekdays.

5. All officers must submit a daily patrol log. This log must indicate the daily starting and ending mileage on the patrol vehicle or other vehicle used, as well as an estimate of any distances patrolled on foot.

6. Council will issue directives for the officer to the Borough Secretary and to the Borough Solicitor, and such directives shall indicate that they have been approved by a majority of Council. Any such Borough Council directives which officers receive from either the Borough Solicitor or the Bo-

rough secretary should be treated as a directive of Borough council. Accordingly, officers are required to follow any and all directives given to them by Borough Council, whether directly or indirectly, through the borough Secretary or the Borough Solicitor.

7. All officers shall compose and submit a daily report of their duties while working as a Borough Police Officer. Reports for the work week should be submitted to the Chief of Police for submission to the Borough Secretary no later than 1:00

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES J. GUARNIERI, JR.,	
Plaintiff	CIVIL ACTION — LAW
-v-	JURY TRIAL DEMANDED
DURYEA BOROUGH, et al.,	
Defendants	NO. 05-1422

AMENDED COMPLAINT

NOW comes the Plaintiff, CHARLES J. GUARNIERI, JR., by his attorney, Cynthia L. Pollick, Esquire, and files the following Complaint against Defendants and avers as follows:

PARTIES

1. Plaintiff, CHARLES J. GUARNIERI, Jr., presently resides in Luzerne County. Plaintiff GUARNIERI (hereinafter referred to as "CHIEF GUARNIERI" is the Chief of Police for Defendant, DURYEA BOROUGH (hereinafter referred to a s "SURYEA") and was deprived wages, employment opportunities, which in effect is a demotion, and his rights of free speech were infringed upon on January

21, 2005, and continuing thereafter, after being reinstated pursuant to an Arbitration Award overturning the Defendants' decision to terminate his employment as Chief of Police in 2003.

2. CHIEF GUARNIERI has been a dedicated law enforcement officer for over 20 years competently and tirelessly serving the citizens of Luzerne County. Before accepting the position of Chief of Police of Duryea in September 2000, CHIEF GURNIERI was employed with the Pittston Township Police Department for 17 years.

3. CHIEF GUARNIERI seeks redress for violations of his constitutional rights of due process, including but not limited to the fact that CHIEF GUARNIERI was never given a pre- or a post-deprivation hearing. CHIEF GUARNIERI seeks redress for violations of his First, Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983.

4. Defendant, DURYEA BOROUGH, is a Commonwealth municipality with a principal office at 315 Main Street, Duryea, Pennsylvania.

5. Defendant, DURYEA BOROUGH OF COUNCIL is part of the Commonwealth municipality of the Borough of Duryea, and operates out of 315 Main Street, Duryea, Pennsylvania.

6. Defendant, ANN DOMMES, is the President of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

7. Defendant, LOIS MORREALE, is the Borough Secretary of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

8. Defendant, Frank GROBLEWSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

9. Defendant, EDWARD ORKWIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

10. Defendant, ROBERT WEBB, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

11. Defendant, AUDREY YAGER, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

12. Defendant, JOAN ORLOSKI, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

13. Defendant, ALFRED AKULONIS, is a member of Defendant Duryea Borough of Council, and operates out of 315 Main Street, Duryea, Pennsylvania.

14. At all times material hereto, Defendants, DURYEA BOROUGH OF COUNCIL, DOMMES, MORREALE, GROBLEWSKI, ORKWIS, WEBB, YAGER, ORLOSKI, AKULONIS were servants, agents, and/or employees of Defendant Borough of Dunmore, and were acting under color of state law when they engaged in official policy, custom, and decision to deprive CHIEF GUARNIERI of his right to free speech and his right not to be harmed in absence of "just cause"..

JURISDICTION

15. This suit is brought and jurisdiction lies pursuant to the 42 U.S.C. § 1983 for constitutional violations of CHIEF GUARNIERI's rights pursuant to the First, Fourth and Fourteenth Amendments.

COUNT I
VIOLATION OF CHIEF GUARNIERI'S CONSTITUTIONAL RIGHT TO DUE PROCESS PRE- AND POST-DEPRIVATION RIGHT PLAINTIFF V. DEFENDANTS

16. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through fifteen (15) above as if set forth herein at length.

17. On January 21, 2005, CHIEF GUARNIERI was reinstated pursuant to an Arbitrator's award after a long struggle with Defendants who terminated his employment in 2003.

18. Defendants vigorously opposed CHIEF GUARNIERI's return through the arbitration process.

19. Upon his return, Defendants restricted CHIEF GUARNIERI in his job duties, speech, opportunities for wages as well as disciplined in retaliation for him petitioning the government, his association with the union, and speaking out against Defendants on matters of public concern. The actions of Defendants in restricting his job duties, in essence, was a demotion.

20. Defendants provided CHIEF GUARNIERI with a list of restrictions. The laundry list of restrictions included but not limited to "you are not to attend council meetings as the chief of police . . .", "you are to go home at the end of your eight hour shift", "you must patrol 4-5 hours during your eight hour shift", "you are not to work more than eight hours per day or more than 40 hours per week unless you receive express permission from Borough Council", and must submit weekly report of ". . detailed description of your daily activities".

21. Obviously, Defendants were restricting CHIEF GUARNIERI's job performance by placing ridiculous, unprecedented, humiliating requirements on CHIEF GUARNIERI, which were not part of the CBA and violated the terms of CHIEF GUARNIERI's employment and were placed on him in retaliation for him exercising his constitutional rights.

22. CHIEF GUARNIERI's position was and is protected by the Collective Bargaining Agreement (hereinafter "CBA").

23. CHIEF GUARNIERI did nothing to cause Defendants to retaliate against him.

24. Despite the fact that CHIEF GUARNIERI could only be harmed for "just cause", Defendants still infringed on his rights of free speech, his opportunity o make a living, and restricted his engagement in other activities which were and are an employment benefit to him as well as formally disciplining him.

25. CHIEF GUARNIERI has been continually harassed by Defendants.

26. CHIEF GUARNIERI has a property interest in his position as a Chief of the Police Department

27. Defendants never gave CHIEF GUARNIERI oral or written notice why his right to free speech and opportunity to make a living was infringed, he was disciplined, and prohibited from engaging in activities which are an employment benefit to him.

28. Defendants never provided CHIEF GUARNIERI with a pre-deprivation hearing, or any post-deprivation hearing as required by law.

29. Defendants have intentionally failed to provide CHIEF GURNIERI with any hearing or notice of charges, and therefore, have deprived CHIEF GUARNIERI of his constitutional right to a pre- and post- deprivation hearings.

30. Defendant Duryea Borough was deliberately indifferent to CHIEF GUARNIERI's rights, and intentionally failed to train its employees adequately, and also failed to have policies in place prohibiting the conduct in question.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT II
FIRST AMENDMENT RETALIATION CLAIM FREEDOM OF PETITION AND SPEECH PLAINTIFF V. DEFENDANTS

31. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty (30) above as if set forth herein at length.

32. CHIEF GUARNIERI petitioned the government by filing several grievances against Defendants.

33. CHIEF GUARNIERI also engaged in speech on Police and Union matters with defendants once he was finally reinstated.

34. CHIEF GUARNIERI was retaliated for filing grievances and engaging in free speech by being criticized, denied employment opportunities, harassed, disciplined, restricted in speech as well s restricted in his ability to perform his job duties, which in essence, is a demotion.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to back pay, front pay, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

COUNT III
VIOLATION OF SECTION 1983 FIRING IN RETALIATION FOR CHIEF GUARNIERI'S ASSOCIATION WITH THE UNION PLAINTIFF V. DEFENDANTS

35. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty-four (34) above as if set forth herein at length.

36. CHIEF GUARNIERI was affiliated with the Fraternal Order of Police, and assisted the union in matters.

37. Defendants were fully aware of CHIEF GUARNIERI's association with the Fraternal Order of Police, and in retaliation for the same harmed him as described above.

COUNT IV

FIRST AMENDMENT RETALIATION CLAIM FREEDOM OF PETITION PLAINTIFF V. DEFENDANTS

38. Plaintiff, CHIEF GUARNIERI, hereby incorporates by reference paragraphs one (1) through thirty-seven (37) above as if set forth herein at length.

39. Defendants have continued to harass Plaintiff by threaten him with discipline as a result of his lawsuit against Defendants.

40. Defendants' conduct has even risen to the level of withholding his pay unwarrantedly and illegally.

41. Defendants have singled Plaintiff out in withholding pay since other Officers have filed completed forms similarly yet they received their overtime and/or comp pay.

42. Defendants' action are done in retaliation for him filing and pursing this litigation.

WHEREFORE, Plaintiff seeks all remedies available pursuant to U.S.C. § 1983, including but not limited to injunctive relief in the nature of an Order restricting Defendants from harassing Plaintiff, payment of wages due, nominal damages, punitive damages, attorney fees and costs, pre- and post- interest, delay damages, reformation of Plaintiff's employment records, letters of good reference, and emotional distress.

A Jury Trial is demanded on all counts.

By: s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire
Pa. I.D. No.: 83826
Greater Pittston Professional Center
126 S. Main Street, Suite 201
Pittston, PA 18640
(570) 654-9675

Filed As Part Of The Record
In The United States District Court
For The Middle District Of Pennsylvania

WHISARD Compliance Action Report	
U.S. Department of Labor Employment Standards Administration Wage and Hour Division	
Case ID: **1468825** Local Filing Number: **2007-349-03748** WHMIS Case Number: Registration Date: **01/29/2007** Assignment Date: **02/23/2007**	Originating District: **Wilkes Barre PA District Office** Investigating District: **Wilkes Barre PA District Office** Lead Investigator:
Employer Information Trade Name: **Duryea, Borough of** Address: **315 Main Street** **Duryea, PA 18642**	Legal Name: **Police Department** EIN: : **24-6000584** County: **Luzerne** NAIC Code: **09640** No. Of Employees: **10**

Investigation Information	
Period Investigated From: **03/10/2005** To: **03/09/2007** Investigation Type: **Complaint** Investigation Tool: **Full Investigation** Compliance Status: **Agree to Comply**	BNPI: Reinvestigation: Recurring Violation: Future Compliance Agreed: Involved in AG:
Recommended Action:	
BCDS: CMP: Litigation: Civil Action: Criminal Action: Submit For Opinion:	RO/NO Review: Follow Up Investigation: Other Action: Denial of Future Certificate: BW Payment Deadline: **3/26/2007** Trailer forms attached:

CL		
Violation/ Compliance Status	**Violations**	**BWs Computed**
No Violation found for this act/ Compliance (no violations found)		

CL (Continued)		
EEs ATP	**BWs Agreed**	**CMPs***

***CMPs computed do not necessarily indicate CMPs assessed.**

FLSA		
Violation/ Compliance Status	**Violations**	**BWs Computed**
Failure to pay Overtime/Agree To comply	2	$338.53
FLSA BW Totals:	2	$338.53

FLSA (Continued)		
EEs ATP	**BWs Agreed**	**CMPs/LDs**
2	*$338.53*	
2	*$338.53*	

Unduplicated Employees Found: *2*	Unduplicated Employees Agreed: *2*
Total Amount Computed: *$338.53*	Total Amount Agreed: *$338.53*

Conclusions & Recommendations:

FLSA/OT complaint from current EE, C. Guarnieri, alleging failure to pay for all hrs. wrkd. In December, 2006. Enterp. Cov. Under sec. 3(s)(1)C) Invest. Was not expanded to entire Borough. OT viols. Cited. Provided HRG, Fact Shts. 7 & 44, Parts553 & 785, WH-134, wh-56, WH-58s, BCDS instr. Per conf. with Borough Secretary L. Morreale, fut. Compliance assured/payment of BWs by 03/26/2007.

WH1 Signature: [unreadable] Date: **03/09/2007**
Reviewed By: /s/ Date: 3/20/07

Duryea, Borough of Case ID: 1468825

NARRATIVE REPORT

Borough of Duryea
Police Department
315 Main Street
Duryea, PA 18642
(570)655-2829
FEIN:24-6000584

This investigation was initiated as the result of a complaint; see below.

COVERAGE:

Subject is the police department of a local municipality within Luzerne County. The Borough of Duryea was incorporated in 1902. The municipality is governed by a 5-member council and a mayor. The current mayor is Mr. Keith A. Moss. Council President is Alfred Akulonis, Jr. Day-to-day business is handled by the Borough Secretary, Lois Morreale, who is appointed by the Borough Council every two years.

All 10 employees of the establishment were covered on an enterprise basis under Section 39s)(1)(C) for

the entire investigative period. See Exh. C-1. Coverage was not disputed.

The period of investigation is from 03/10/2005 to 03/09/2007.

Assignment was not expanded to include the remainder of the borough of Duryea.

EXEMPTIONS:

Section 13(b)(20) was found not applicable.

In accordance with FOH 32a00(c), section 7(k) was not available to the ER, as the employees of the police department are covered by a collective bargaining agreement that requires overtime wages after 40 hours/week. See exhibit D-1.

Section 7(o) available to ER, however, the CBA limits the amount of comp time that can be carried forward to the next six months. See exhibit D-1.
No other exemptions claimed or allowed.

STATUS OF COMPLICANCE:

The current WHD intervention was scheduled upon receipt of an overtime complaint from a current EE, Charles Guarnieri, alleging that he was not paid for 14 hours in a pay period in December, 2006. See complaint information and exhibit B-1.
Prior history – none.

The investigation revealed the employer's status of compliance, as follows:

Section 6 – Minimum Wage

No Violations.

Section 7 – Overtime

2 employees were not paid time and one-half their regular rate of pay for working over 40 hours per week. These violations occurred as the result of the employer failing to include a longevity pay in the computation of overtime wages and the failure to pay for some hours worked in 2006-2007. Total of #338.53 in back wages has been computed on exhibits A-1 through A-2.

Method of back wage computation: Assessment for unpaid hours worked was made at time and a half the employees' regular rate of pay. Half-time assessment for longevity pay using the coefficient table.

Section 12 – Child Labor

No minors employed in the department within the SIP.

The complainant's allegation has been substantiated. The complainant is due $284.11 in BWs. It should be noted that the complainant was not due 14.5 hours of OT in the pay period ending 12/09/2006, as he used a vacation day in the one week. See exhibit A-3-g. He was due only 6.5 hours of OT for that pay period.

DISPOSITION:

A final conference was held by WHI with Ms. Lois Morreale, Borough Secretary, on 03/09/2007 at the establishment. All violations were discussed in detail. Lois Morreale stated that the reason the violations occurred is that the borough was not aware of the need to include the longevity pay in the OT computations. With respect to the unpaid hours, the Mayor and the Borough Council have been at odds over the number of hours worked by the employees of the Department. See exhibits D-2 through D-9. The participant was advised that to comply in the future the Borough must:

1)Pay all non-exempt employees at least the minimum wage

2)Pay all non-exempt employees at least T-1/2 for hours worked in excess of forty in a workweek, or provide compensatory time off at T-1/2 the hours for overtime hours worked.

3)Keep and maintain records as required by Part 516.

4)Comply with all applicable CL regulations.

Borough Secretary Lois Morreale agreed to fully comply in the future with all applicable provisions of the FLSA.

Publications provided and discussed: HRG, Fact Sheets 7 and 44, Parts 553 and 785, WH-134.

Form WH-56, WH-58's, and BCDS instructions were mailed to the Borough on 03/15/2007. The Borough Secretary was contacted via phone on 03/16/2007 and advised about the handling of the BW proof of pay-

ment. Ms. Morreale verbally agreed to pay the BWs on 03/26/2007.

Resolution of complaint: Complainant appears on the Form WH-56. The complainant was advised of the results of this investigation on 03/12/2007.

Recommendation:

Completed by:

Wage & Hour Investigator
03/19/2007